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Supreme Court of the United States

October Term, 1997

OLLIE MASTRONARDI,
Petitioner,

v.

THE STATE OF OHIO,
Respondent.

Petition For A Writ Of Certiorari
To The Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI
with Appendix

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120 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether Petitioner's right to due process of law was violated when the trial court permitted the state prosecutor to use grand jury transcript only available to him for cross-examination purposes.

II. Whether Petitioner's right to due process was violated when the prosecution failed to preserve evidence and/or altered evidence so as not to allow the Petitioner the right to examine and evaluate evidence.

III. Whether Petitioner's right to presentment or indictment by grand jury was violated when the jury was presented with an unindicted additional finding not part of the indictment.

IV. Whether the Petitioner's Fourth Amendment rights were violated when selected custodial pre

Miranda remarks were admitted into evidence at his trial.

V. Whether the Petitioner's rights to due process of law were violated when the trial court accepted inconsistent jury verdicts.

VI. Whether the Petitioner's rights to due process of law was violated when the state was permitted to prosecute Petitioner for multiple offenses arising from the same conduct.

LIST OF PARTIES TO PROCEEDINGS AND COURT BELOW

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Respondent: Kevin Baxter
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OPINIONS AND ORDERS ENTERED IN THE CASE

In May 1996 Petitioner was convicted in State Court of Vehicular Homicide and Involuntary Manslaughter. A copy of his Sentencing Order appears in the Appendix at Section C. He appealed his conviction to the Court of Appeals of Erie County, Ohio and that Court rendered an Opinion and Journal Entry on December 5, 1997. A copy of that Opinion and Journal Entry appears in the Appendix at Section B. Further he appealed his case to the Supreme Court of Ohio which Court rendered an opinion on April 1, 1998 denying leave to appeal. A copy of that Entry appears in the Appendix at Section A.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1257 and Rule 10(B) and (C), Supreme Court Rules. The judgment of the Ohio Supreme Court from which this appeal was taken is dated April 1, 1998.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves five (5) Amendments to the United States Constitution:

(A) The Fourth Amendment, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place

to be searched, and the persons or things to be seized.

(B) The Fifth Amendment, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken from public use without just compensation.

(C) The Sixth Amendment, which provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have assistance of counsel for his defense.

(D) The Eighth Amendment, which provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

(E) The Fourteenth Amendment, which provides in part:

No state shall make or enforce any law which shall abridge the

privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Ohio Revised Code 2903.04
(See Appendix at Section F)
Ohio Revised Code 2903.06
(See Appendix at Section F)
Ohio Revised Code 2903.07
(See Appendix at Section F)

PETITION FOR WRIT OF CERTIORARI

The Petitioner, OLLIE MASTRONARDI, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of Ohio decided on April 1, 1998.

Respectfully submitted,

DAVID C. JACK
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STATEMENT OF THE CASE

On July 7, 1995 the Erie County, Ohio grand jury returned a two (2) count indictment naming Petitioner and alleging violations of Ohio Revised Code 2903.06 (Aggravated Vehicular Homicide) and Ohio Revised Code 2903.04(B) (Involuntary Manslaughter). The indictment, appearing in Appendix at Section D, did not contain a specification that Petitioner was under the influence of alcohol.

In May of 1996 Petitioner was found not guilty of Aggravated Vehicular Homicide but guilty of the lesser included offense of Vehicular Homicide and further was found guilty of an additional finding presented by the Court to the jury that the Petitioner was under the influence of alcohol and further Petitioner was found guilty of Involuntary Manslaughter. He was sentenced to 5 – 10 years on the Involuntary Manslaughter conviction and 6 months on the Vehicular Homicide conviction to be served concurrently. A copy of

the Sentencing Order of the Trial Court appears in the Appendix at Section C.

The salient facts of this case are these. Scott Brabander was on his family boat with his Father, Mother and a friend. This boat was idling parallel to a dock on the eastern side of Kelly's Island, Ohio, an island in Lake Erie. The boat was waiting to dock. At about 3:00 p.m. Petitioner's boat was spotted traveling fast about ¼ mile from the dock. Petitioner's boat slowed as it approached the Brabander's boat, however, it apparently hit the port side of the Brabander boat, flew over and landed on the other side. Scott Brabander's Mother and Father, as well as his friend, escaped unharmed. However, Scott Brabander died as a result of blunt force to his back. Following the collision the Petitioner was taken into custody by the Ohio Department of Natural Resources Agent. Certain field sobriety tests were administered to Petitioner and he declined a breath test. However, blood was drawn which was found to be negative for alcohol and/or drugs.

In the Appendix herein, appearing at Section B, is the Court of Appeals Opinion and Judgment Entry. In that Opinion and Judgment Entry is a more detailed description of the facts of this case.

After being convicted and sentenced in May of 1996 Petitioner filed an appeal in the Court of Appeals of Erie County, Ohio. The Court of Appeals rendered its Decision in December of 1997 (See Appendix at Section B). Petitioner then timely filed a Notice of Appeal to the Supreme Court of Ohio and on April 1, 1998 the Supreme Court of Ohio denied leave to appeal (See Appendix Section A).

Each and every one of the issues presented here was timely objected to at the trial court level and assigned as Assignments of Error in the Court of Appeals in Petitioner's direct appeal. Question No. I regarding the use of grand jury testimony was originally assigned as error number ten in Petitioner's direct appeal. (See Appendix at Section B).

Issue Number II involving the failure to preserve evidence and altering evidence is contained in Assignment of Error Number Twelve in the Court of Appeals Decision. (See Appendix at Section B). Mike Benfer a mechanic was asked by the Ohio Department of Natural Resources was asked to determine if there was a problem with the throttles of the Petitioner's boat. While he was working on the boat he started the engines and moved the throttles and drives to test their operation. He then tightened the cable.

The third issue presented here regarding the unindicted additional finding was assigned as error in the Court of Appeals in Assignment of Error Number Six (See Appendix at Section B).

The issues presented in Number V having to do with the custodial pre-Miranda warnings were assigned as error in the Court of Appeals as Assignment of Error Number two (See Appendix at Section B). In addition this evidence was subject to a pre-trial suppression hearing. In this case

Petitioner did not argue that the content of his responses was incriminating. The only incriminating aspect of Petitioner's responses was the manner in which he spoke them: that is he sang the ABC's and hesitated while counting. The Court therefore interpreted Petitioner's case as not being a communication citing Pennsylvania v. Muniz (1990), 496 U.S. 582 at 591.

Issue Number VI involving the inconsistent verdicts was assigned as error number five in the Court of Appeals Decision (See Appendix at Section B). Issue Number VII involving the multiplicity in the indictment was assigned as error number nine in the Court of Appeals.

In summary all of the issues presented here have been timely and properly raised before the state court. All of the issues were fully litigated before the trial court and the Court of Appeals and at no time has the state argued otherwise.

ARGUMENT

I.

Whether Petitioner's right to due process of law was violated when the trial court permitted the state prosecutor to use grand jury transcript only available to him for cross-examination purposes.

Ohio law provides in Ohio Criminal Rule 6(E) (See Appendix at Section H) in relevant part that deliberations of the grand jury and the vote of any grand jurors shall not be disclosed. Disclosure or other matters before the grand jury may be made to the prosecuting attorney for use in the performance of his duties a . . . prosecuting attorney . . . may disclose matters . . . but may disclose such matters only when so directed by the Court. The sanctity and secrecy of grand jury proceedings has been historically and jealously guarded by the Ohio courts. State v. Tenbrook (1997), 34 Ohio Misc.2d 14 at 15. See

also State v. Grewell (1989), 45 Ohio St.3d 4 at 7. Ohio courts have recognized that "the disclosure of grand jury testimony is an exception to the historical rule of secrecy that protects grand jury proceedings and he who would stripe the mantel of secrecy from the proceedings must bear the burden of showing the need for such action. State v. Roberts (1976), 50 Ohio App.2d 237 at 247.

In this case the prosecutor violated Ohio law by obtaining a transcript of secret grand jury proceedings without the direction of the Court. He then used this transcript to cross-examine witnesses. Petitioner feels that this is a violation of his due process rights as guaranteed by the Fifth, Sixth and Fourteenth Amendments. The Ohio Courts failed to take into consideration Pittsburgh Plate Glass Company v. United States (1959), 360 U.S. 395 and failed to protect the historical rule of secrecy inherent in grand jury proceedings.

II.

Whether Petitioner's right to due process was violated when the prosecution failed to preserve evidence and/or altered evidence so as not to allow the Petitioner the right to examine and evaluate evidence.

This Court in Arizona v. Youngblood (1988), 488 U.S. 51 held that the due process clause of the Fourteenth Amendment as interpreted in Brady makes good or bad faith of the state irrelevant when the state fails to disclose to the defendant material exculpatory evidence.

The Youngblood case was recognized by the Ohio Courts in State v. Lewis (1990), 70 Ohio App.3d 624 at 633. Further this Court in United States v. Bagley (1984), 473 U.S. 667 held that evidence shall be determined material only if there is a reasonable probably that had the evidence been disclosed to the defense the result of the proceeding would have been different.

Petitioner believes that the Ohio courts failed to take this Court's directive in consideration in ruling upon this issue. Petitioner's defense centered around the condition and position of the throttles. When Mr. Benfer altered the position of the throttles the state failed to preserve the integrity of the evidence and thus the Petitioner was denied a material part of his defense. Petitioner made no claim or allegation of criminal wrong doing or no claim of bad faith.

III.

Whether Petitioner's right to presentment or indictment by grand jury was violated when the jury was presented with an unindicted additional finding not part of the indictment.

Petitioner feels that his constitutional rights were violated when the jury was presented with "an additional finding" without presentment or indictment by grand

jury. Both the Fifth Amendment of the United States Constitution and Article I, Section 10 of the Ohio Constitution provide that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. The state court basically found that this was not a specification or an amendment to the indictment but rather a special finding. While there is no provision under state law for special findings Petitioner feels that this is a issue of presentment and feels that his constitutional rights were violated.

IV.

Whether the Petitioner's Fourth Amendment rights were violated when selected custodial pre Miranda remarks were admitted into evidence at his trial.

This Court has held that the admission of cognitive statements made during field sobriety testing violated a defendant's Fifth Amendment right

against self-incrimination, In Pennsylvania v. Muniz (1990), 496 U.S. 592. In this case Petitioner's constitutional rights were violated when questions were used to determine his ability to think and analyze in an impaired state and responses were then evaluated by the officers to determine his state of sobriety. The Court of Appeals Decision in this case held that with respect to an individual privilege against self-incrimination "the privilege is a bar against compelling communications or testimony but that compulsion which makes a suspect or accused a source of real or physical evidence does not violate it" and cites Pennsylvania v. Muniz, supra. Accordingly, the Court of Appeals goes on to say physical characteristics such as ones manner of speech that is slurred speech, blood alcohol level, fingerprints, photographs, handwriting, voice, stance, walk or jester are not testimonial responses to which the privilege applies and against cites Muniz. The Court of Appeals went on to say that had Petitioner been unable to count then perhaps his responses

would have been incriminating, however, the content of Petitioner's responses was accurate. The only incriminating aspect of Petitioner's responses was the manner in which he spoke them: that is he sang the ABC's and hesitated. Therefore the Court of Appeals found that Petitioner's rights were not violated and that the trial court had correctly denied his motion to suppress.

Petitioner feels that the state courts here have misinterpreted the Muniz decision. The Petitioner feels that his singing the ABC's does amount to a response to a custodial interrogation and therefore fits within the prohibition of Muniz.

V.

Whether the Petitioner's rights to due process of law were violated when the trial court accepted inconsistent jury verdicts.

On May 10, 1996 the jury in this case returned a verdict finding Petitioner not guilty of Aggravated

Vehicular Homicide. The mental culpability requirement for Aggravated Vehicular Homicide under Ohio law is recklessness. The jury found Petitioner guilty of the lesser included offense of Vehicular Homicide which crime requires a mental culpability of negligence. In looking at this verdict one would think that the jury in this case determined that Petitioner has acted negligently under the facts and circumstances of this case. However, the jury in addition found the Petitioner guilty of Involuntary Manslaughter which has a mental culpability requirement of recklessness.

The Ohio State Supreme Court in State v. Koss (1990), 49 Ohio St.3d 213 at 219 overruled a claim that inherently inconsistent verdicts are violations of Ohio law.

The Court of Appeals Decision on page 22 of the Opinion cites State v. Adams (1978), 53 Ohio St.2d 223 which holds that several counts of indictment are not interdependent and that inconsistency in a verdict does not arise out of inconsistent responses to

different counts. The Court cites United State v. Powell (1984), 469 U.S. 57 at 65.

It is very difficult to imagine a situation where there is inconsistency within the count. In this case the inconsistency is blatant. On one hand the jury finds the Petitioner negligent and on the other hand the jury finds the Petitioner reckless. Petitioner feels that the jury in this case lost its way.

In Powell, supra, this Court felt that the criminal defendant was afforded protection against jury irrationality by the independent review of the sufficiency of the evidence undertaken by the trial court and appellate court. Powell, supra, at 67. Petitioner contends that in this case there was no meaningful evaluation of the sufficiency of the evidence.

VI.

Whether the Petitioner's rights to due process of law was violated when the state was permitted to prosecute Petitioner for multiple offenses arising from the same conduct.

The basis of this issue is that the interplay between the two Ohio Revised Code Sections creates a situation which becomes confusing to a jury and creates an atmosphere which results in the unconstitutional detriment of an individual who stands accused of both crimes at the same time. Petitioner is asked to defend whether or not he was reckless or defend whether he was negligent or to defend that he had no criminal culpability. The confusion became apparent when the jury returned a verdict on one count citing Petitioner's negligence and on another count citing his recklessness. The state court cited State v. Chippendale (1990), 52 Ohio St.3d 118. In that case the Ohio State Supreme Court held that one can be charged with both

Involuntary Manslaughter and Aggravated Vehicular Homicide but if the allegations arose from a single series of events Petitioner could only be sentenced to one of those counts. Ohio has a statutory scheme wherein special provisions prevail over general provisions. However, the Chippendale Court found that the legislatures' intent was manifest that the general and special provisions be applied co-extensively and where the provisions are allied offenses of similar import then the prosecution may charge on and try both but the defendant may be sentenced for only one of those offenses.

Petitioner feels that the constitutional problem here is that the prosecutor is given the apparent authority to convert both crimes to felonies by charging Petitioner with Involuntary Manslaughter. The prosecution in effect writes out the misdemeanor from the law by charging Petitioner with Involuntary Manslaughter. It is not clear in this case as Chippendale stated that it is the legislative intent that general and

specific provisions be applied co-extensively.

CONCLUSION

For the reasons stated herein, Petitioner respectfully prays that this Court grant his Petition.

Respectfully submitted,

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THE SUPREME COURT OF OHIO:

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THE SUPREME COURT OF OHIO

Filed
APR 01 1998
Supreme Court
of Ohio

Filed
98 APR 16
Erie County
Common Pleas Court

THE STATE OF OHIO,	:	**1998 TERM**
Appellee,	:	**Case No. 98-102**
vs.	:	
	:	**E N T R Y**
Ollie Mastronardi,	:	
Appellant.	:	**95-CR-371**

Upon Consideration of the Jurisdictional memoranda filed in this case, the Court denies leave to appeal and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by LAWRENCE J. WHITNEY, Esq.

(Erie County Court of Appeals; No. E96033).

/s/ Thomas J. Moyer
Chief Justice

IN THE COURT OF APPEALS OF ERIE COUNTY

State of Ohio — **Court of Appeals No. E—96-033**
Appellee — **Trial Court No. 95-CR-371**

v.

Ollie Mastronardi — **OPINION and JUDGMENT ENTRY**
Appellant — **Decided: December 5, 1997**

* * * * *

Kevin J. Baxter, prosecuting attorney, and
Mary Ann Barylski, for appellee.

Lawrence J. Whitney, for appellant.

* * * * *

KNEPPER, J. This is an appeal from appellant's judgment of conviction for vehicular homicide and involuntary manslaughter and his sentences of incarceration therefor. Appellant's convictions arise out of the watercraft collision, occurring on June 24, 1995, near Kelley's Island, Ohio, which took the life of Scott Brabander. For the reasons that follow, this court finds Ollie Mastronardi's appeal well-taken, in part, and not well-taken, in part.

Appellant was indicted on July 7, 1995, in Count One for aggravated vehicular homicide while using a watercraft, in violation of R.C. 2903.06(A), an aggravated felony of the third degree. Appellant was indicted in Count

Two for involuntary manslaughter, in violation of R.C. 2903.04(B), an aggravated felony of the third degree, for having caused the death of Scott Brabander as a proximate result of committing one or more of the following misdemeanor offenses: operating a watercraft while under the influence, in violation of R.C. 1547.11(A) (1); reckless operation, in violation of R.C. 1547.07; safe speed, in violation of Ohio Adm.Code 1501:47-2-06; action to avoid collision, in violation of Ohio Adm.Code 1501:47-2-08; and crossing situation, in violation of Ohio Adm.Code 1501:47-2-15.

Two motions to suppress were filed and came for hearing on February 1, 1996. In his first motion to suppress, appellant asserted that the statements obtained on June 24, 1995 by Officer John P. Johnston of the Ohio Department of Natural Resources ("ODNR") Watercraft Division should be suppressed as the statements were acquired during custodial interrogation without appellant's Miranda rights being explained and/or without a waiver of these rights. In his second motion to suppress, appellant argued that the responses he gave during a "field sobriety test" should be suppressed as they were incriminating and made before he was read his Miranda rights.

After conducting a hearing on appellant's motions to suppress, the trial court sustained in part and overruled in part appellant's first motion to suppress, finding:

> "Said motion to suppress as to statements made by defendant prior to receiving Miranda warnings is granted, with the exception of the defendant's responses as to who owned the boat and who operated the boat;

As a result of his convictions, appellant was sentenced to a definite sentence of six months as to the vehicular homicide (R.C. 2903.07) charge, while under the influence of alcohol, and to an indeterminate sentence of not less than five years nor more than ten years as to the involuntary manslaughter (R.C. 2903.04) conviction which resulted from the commission of the following misdemeanors: operating a watercraft under the influence of alcohol; crossing situation; action to avoid collisions; safe speed; and reckless operation. These sentences were run concurrently.

The evidence which gave rise to appellant's convictions can be summarized as follows. On June 24, 1995, appellant was operating his Top Gun Cigarette boat in conjunction with a poker run.[1] After getting his boat and filling it with gas, appellant and Ron Liguzinski went to the Casino restaurant/bar on Kelley's Island between 10:30 and 11:00 a.m. While at the Casino, Bob Vitt saw

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[1]A poker run in this setting is an event whereby the participants travel from marina to marina collecting cards. At the end of the event, the participant with the best poker hand wins. This poker run was not a race.

appellant drink two Sidecars.[2] Appellant and Liguzinski left the Casino with Sheila Sikora and her friend between 11:30 a.m. and 12:30 p.m.

Appellant next went to the Twine House located on the Huron River. While at the Twine House, the bartender, Rory Kaip, served appellant and Liguzinski each a Sidecar. Appellant, Liguzinski, Sandra Hooper, and Luanne Borders left the Twine House around 3:15 p.m., heading back to the Casino at Kelley's Island.

Meanwhile, Scott Brabander was on his family's Wellcraft with his father, his mother, and his friend Rodger. The Brabanders testified that they had decided to stop at Kelley's Island. When they arrived, the dock area was very congested. According to the dock master, Bryce Keesee, he told the Brabanders on the Wellcraft that he was trying to find them a dock. The Wellcraft was idling parallel to the eastern-most dock with its bow pointing south.

At this point, approximately 3:30 p.m., appellant's boat was spotted between one hundred yards and one-quarter of a mile from the dock at Kelley's Island, traveling between forty- five and fifty m.p.h. Witnesses for the state testified that appellant's boat slowed to twenty-five to forty m.p.h., between two to four boat lengths from the Wellcraft. The Cigarette boat then hit the Wellcraft's port side, flew

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[2]Sidecar is an alcoholic beverage consisting of Brandy, Triple Sec, sour mix, and soda water.

over the Wellcraft, and landed in the water on the other side between the dock and the Wellcraft.

The occupants of the Wellcraft attempted to jump off prior to the collision. Mr. and Mrs. Brabander escaped unharmed into the water; however, Scott died as a result of a blunt force to his back which broke twelve ribs, thereby lacerating his pulmonary artery and airway. Rodger remained on the Wellcraft unharmed.

Following the collision, appellant was taken into custody by the ODNR and a field sobriety test was administered. Appellant failed the tests and was then arrested. Appellant declined to take a breathalyzer, but his blood was drawn approximately ten and one-half hours after the collision. No alcohol or drugs were found in appellant's blood sample.

On appeal, appellant asserts the following fourteen assignments of error:

"**ASSIGNMENT OF ERROR NUMBER ONE**

"THE TRIAL COURT COMMITTED PREJUDICIAL REVERSIBLE ERROR WHEN IT SENTENCED APPELLANT PURSUANT TO TWO (2) COUNTS OF THE INDICTMENT THAT WERE ALLIED OFFENSES OF SIMILAR IMPORT PURSUANT TO R.C. 2941.25

"**ASSIGNMENT OF ERROR NUMBER TWO**

"APPELLANT WAS DENIED HIS RIGHTS AS GUARANTEED BY THE FOURTH, FIFTH AND

FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 14 OF THE OHIO CONSTITUTION WHEN SELECTED CUSTODIAL PRE MIRANDA WARNING REMARKS WERE RULED ADMISSIBLE BY THE TRIAL COURT

"ASSIGNMENT OF ERROR NUMBER THREE

"THE TRIAL COURT COMMITTED PREJUDICIAL REVERSIBLE ERROR BY ABUSING ITS DISCRETION WHEN THE TRIAL COURT FAILED TO GRANT A DEFENSE MOTION FOR CONTINUANCE OF TRIAL DUE TO (1) THE ILLNESS OF A DEFENSE WITNESS AND (2) BLATANT DISCOVERY VIOLATIONS IN CONTRAVENTION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND OHIO CRIMINAL RULE 16

"ASSIGNMENT OF ERROR NUMBER FOUR

"THE TRIAL COURT COMMITTED PREJUDICIAL REVERSIBLE ERROR BY PERMITTING STATE'S WITNESSES TO TESTIFY ON MATTERS BEYOND THAT WHICH THEY WERE QUALIFIED TO TESTIFY IN CONTRAVENTION OF APPELLANT' S

RIGHTS PURSUANT TO THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION *AND OHIO EVIDENCE RULE 702*

"**ASSIGNMENT OF ERROR NUMBER FIVE**

"THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION WHEN THE TRIAL COURT ACCEPTED THE INCONSISTENT JURY VERDICTS RETURNED IN THIS CASE

"**ASSIGNMENT OF ERROR NUMBER SIX**

"THE TRIAL COURT COMMITTED PREJUDICIAL REVERSIBLE ERROR WHEN IT PRESENTED THE JURY WITH AN UNINDICTED, 'ADDITIONAL FINDING' IN CONTRAVENTION OF CRIM. R. 7(D) AND THE DUE PROCESS CLAUSES OF BOTH THE UNITED STATES AND OHIO CONSTITUTIONS

"**ASSIGNMENT OF ERROR NUMBER SEVEN**

"THE TRIAL COURT COMMITTED PREJUDICIAL REVERSIBLE ERROR BY

ALLOWING THE PROSECUTING ATTORNEY TO QUESTION A PROSPECTIVE JUROR ON MATTERS BOTH UNRELATED TO THAT PROSPECTIVE JUROR'S FAIRNESS AND IMPARTIALITY AND PREJUDICIAL TO APPELLANT IN CONTRAVENTION OF CRIM. R.24(A), OHIO TRIAL COURT JURY USE AND MANAGEMENT STANDARD 7(A) AND (C), AS WELL AS THE DUE PROCESS CLAUSES CONTAINED IN BOTH THE UNITED STATES AND OHIO CONSTITUTIONS

"**ASSIGNMENT OF ERROR NUMBER EIGHT**

"THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO CONSIDER THE SENTENCING CRITERIA OF R.C. 2929.12 IN SENTENCING APPELLANT TO THE MAXIMUM TERM OF INCARCERATION PERMITTED BY LAW

"**ASSIGNMENT OF ERROR NUMBER NINE**

"THE TRIAL COURT COMMITTED PREJUDICIAL, REVERSIBLE ERROR WHEN IT DENIED APPELLANT'S MOTION TO DISMISS COURT TWO, INVOLUNTARY MANSLAUGHTER, AND PERMITTED THE STATE TO PROSECUTE APPELLANT FOR BOTH AGGRAVATED VEHICULAR HOMICIDE AND INVOLUNTARY MANSLAUGHTER'S [sic] THE

INCLUSION OF BOTH CHARGES VIOLATED APPELLANT'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 2, 9 AND 16 OF THE OHIO CONSTITUTION

"**ASSIGNMENT OF ERROR NUMBER TEN**

"APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION WHEN THE TRIAL COURT ALLOWED TESTIMONY REGARDING APPELLANT'S CHARACTER IN EVIDENCE IN DIRECT CONTRAVENTION OF OHIO EVID.R. 401, 402, 403 AND 404

"**ASSIGNMENT OF ERROR NUMBER ELEVEN**

"THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO CROSS-EXAMINE DEFENSE WITNESSES BY USE OF GRAND JURY TRANSCRIPTS, WHICH USE VIOLATED THE SECRECY OF THE GRAND JURY AND DENIED APPELLANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE

FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE' UNITED STATES CONSTITUTION

"**ASSIGNMENT OF ERROR NUMBER TWELVE**

"THE APPELLANT WAS DENIED DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS WHEN THE STATE ALTERED THE POSITIONING OF THE CONTROLS OF APPELLANT'S WATERCRAFT AND TAMPERED WITH THE EVIDENCE

"**ASSIGNMENT OF ERROR NUMBER THIRTEEN**

"THE EVIDENCE IN THIS CASE WAS INSUFFICIENT AND THUS THE VERDICTS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND CONTRARY TO LAW

"**ASSIGNMENT OF ERROR NUMBER FOURTEEN**

"THE CUMULATIVE AFFECT [sic] OF THE PREVIOUSLY RAISED PRELIMINARY ASSIGNMENTS OF ERROR IS SUCH THAT APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS WELL AS ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION"

I.

In appellant's first assignment of error, he asserts that the trial court incorrectly sentenced him for two allied offenses in violation of R.C. 2941.25(A). Appellee asserts that because the trial court ordered the sentences to run concurrently, the offenses merged and, therefore, there was no error with respect to sentencing.

"Sentencing is within the sound discretion of the trial court and is generally not disturbed upon review where the sentence is within the confines of the valid statute." Columbus v.Jones (1987), 39 Ohio App.3d 87, 88, citing, Toledo v. Reasonover (1965), 5 Ohio St.2d 22. An abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. State v. Adams (1980), 62 Ohio St.2d 151, 157.

R.C. 2941.25(A) states that a defendant can be indicted for two or more allied offenses, but can be convicted of only one:

> "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one."

In State v. Chippendale (1990), 52 Ohio St.3d 118, 122, the Ohio Supreme Court found that "where the

legislative intent is manifest that general and special provisions be applied coextensively and where the provisions are allied offenses of similar import, then the prosecution may charge on and try both, but the defendant may be sentenced upon his or her conviction for only one of the offenses." An allied offense is one where "the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other ***." Newark v. Vazirani (1990), 48 Ohio St.3d 81, syllabus.

As in this case, the defendant in Chippendale was charged with both aggravated vehicular homicide and involuntary manslaughter. Also, identical to this case, the jury found defendant guilty of both involuntary manslaughter and vehicular homicide, a lesser-included offense of aggravated vehicular homicide. The trial court, however, only sentenced Chippendale on the involuntary manslaughter conviction. The Ohio Supreme Court held that "the prosecution properly charged Chippendale under both of these offenses and the trial court properly sentenced Chippendale on only one of these offenses, albeit on the offense carrying a greater penalty." Chippendale at 123.

In this case, the offenses for which appellant was charged were allied offenses in that they occurred in one series of events, there was only one animus, and there was only one set of circumstances which caused one collision and one death. See Id. As such, we find that the trial court

erred in sentencing appellant on both the vehicular homicide and involuntary manslaughter convictions. See R.C. 2941.25(A). We further find that running the sentences concurrently does not avoid the fact that appellant was sentenced on both counts as such is clearly prohibited.

Appellant asserts that since the trial court incorrectly sentenced appellant, the matter cannot be cured by this court or remanded for resentencing because it would allow the state to elect which charge to pursue. Appellant's argument is that giving the state the option to select a charge would violate appellant's rights to be tried on the same facts on which the grand jury found probable cause and would "defeat [his] right to presentment protected by the Fifth Amendment of the United States Constitution." This court does not agree.

Sentencing matters lie within the sound discretion of the trial court, Columbus v. Jones. supra, not the state. Moreover, this discretion permits the trial court to decide upon which offense to sentence. See Chippendale at 123 ("the trial court properly sentenced Chippendale on only one of these offenses, albeit on the offense carrying a greater penalty.")

Based on the foregoing, this court finds that the trial court abused its discretion in sentencing appellant on both convictions. Accordingly, this matter is remanded to the trial court for resentencing in accordance with this opinion

and Chippendale. Appellant's first assignment of error is, therefore, found well-taken.

II.

In appellant's second assignment of error, he asserts that the trial court erred in admitting the results of appellant's field sobriety test as the test required verbal responses from appellant and he had not been informed of his Miranda rights prior to the test's administration.

In pertinent part, at the suppression hearing, Petty Officer William Kontz testified that he questioned appellant regarding who owned the boat, who was operating the boat, and whether he had consumed any alcoholic beverages that day. Thereafter, appellant was removed from his boat and taken to the Kelley's Island police station. Kontz testified that appellant was not advised of his Miranda rights; however, he was informed that he could refuse to submit to a field sobriety test and a breathalyzer test (Alcohol Sensory III test). Appellant submitted to the field sobriety test; however, he refused a breathalyzer test. During the field sobriety test, appellant was asked to do the following: recite the ABC's without singing; count from twenty-five to one in descending order; count his fingers from one to four and then from four to one by touching his thumb to his fingertips; pat his palms together; touch his finger to his nose; walk and count out nine steps, turn, and return for nine steps; stand on one-leg while counting from one

thousand one to one thousand thirty in ascending order; and submit to a horizontal gaze nystagmus test.

Generally, the nonverbal results of field sobriety tests are not self-incriminating statements subject to Miranda warnings. State v. Henderson (1990), 51 Ohio St.3d 54, 57-58. The issue then becomes whether the verbal responses elicited during a field sobriety test are testimonial responses to interrogation which would invoke one's privilege against self-incrimination.

With respect to an individual's privilege against self-incrimination, the United Supreme Court has held that "'the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it.'" Pennsylvania v. Muniz (1990), 496 U.S. 582, 591, citing Miranda v. Arizona (1966), 384 U.S. 436, 764. Accordingly, physical characteristics, such as one's manner of speech, i.e., slurred speech, blood alcohol level, fingerprints, photograph, handwriting, voice, stance, walk, or gesture, are not "testimonial" responses to which the privilege applies. In Muniz, the court found that a defendant's physical inability to articulate words in a clear manner, due to the lack of muscular coordination of his tongue and mouth, is not itself a testimonial component of a defendant's response to an officer's questions. "Requiring a suspect to reveal the physical manner in which he articulates words, like requiring him to reveal the physical

properties of the sound produced by his voice, *** does not, without more, compel him to provide a 'testimonial' response for purposes of the privilege." Muniz at 592.

In Muniz, the United States Supreme Court found that Muniz's response to what was the date of his sixth birthday should be suppressed because the response to that question could itself be incriminating, since failure to correctly answer could mean that he was too confused to answer because he was under the influence, or he was lying. With respect to Muniz's ability to count aloud while performing certain field sobriety tests, the court found that "Muniz's counting at the officer's request qualifie[d] as a response to custodial interrogation;" however, because he correctly counted, his verbal response to the "instruction [to count] was not incriminating except to the extent that it exhibited a tendency to slur words, which we have already explained is a nontestimonial component of his response." Muniz. supra at footnote no. 17.

In the case sub-judice, appellant has not argued that the content of his responses was incriminating. Had appellant been unable to count or if he had been analphabetic, then perhaps his responses would have been incriminating; however, the content of appellant's responses was accurate. The only incriminating aspect of appellant's responses was the manner in which he spoke them, e.g., he sang the ABC's and hesitated while counting. As set forth above, the manner in which one speaks is nontestimonial

and does not invoke one's privilege against self-incrimination. Accordingly, there was no requirement that appellant be advised of his Miranda rights prior to the administration of the field sobriety test.

This court finds that the trial court correctly denied appellant's motion to suppress the results of appellant's field sobriety test. Appellant's second assignment of error is therefore found not well-taken.

III.

In his third assignment of error, appellant asserts that the trial court abused its discretion in not granting him a continuance of the trial. Appellant requested a continuance because: (1) Sandra Hooper, a key defense witness, was medicated at the time of the trial and would have suffered a significant hardship in coming to the trial during her treatment and, because of her medication, she would have trouble recalling certain events concerning the accident; and (2) the defense did not receive the original video tape taken of defendant's boat until one week prior to trial, thus precluding appellant's witness from conducting an in-depth analysis of the tape.

The decision to grant or deny a motion for continuance is within the sound discretion of the trial court. State v. Sowders (1983), 4 Ohio St.3d 143, 144. An appellate court must not reverse the denial of a continuance unless there has been an abuse of discretion. State v. Unger (1981), 67 Ohio St.2d 65, 67.

In deciding a motion for continuance the trial court may consider the following factors: (1) the length of delay requested; (2) the number of continuances already requested; (3) the inconvenience to litigants, witnesses, opposing counsel and the court; (4) whether the defendant contributed to the circumstance giving rise to the request for a continuance; and (5) other relevant factors depending on the facts of the case. Id. at 67-68. See, also, State v. Landrum (1990), 53 Ohio St.3d 107, 115. "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process.'" State v. Denson (1990), 66 Ohio App.3d 833, 836, citing, Ungar v. Sarafite (1964), 376 U.S. 575, 589. "'The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.'" Id.

In this case, Hooper's physician, Dr. Joseph P. Myers, indicated in a letter, dated April 15, 1996, that, in his opinion, "Hooper's health would best be served by her not having to testify in court in the next two weeks." Dr. Myers further stated, "It is unlikely that the medication that she is presently taking would adversely effect [sic] her mental capacity, however, there have been reported cases of encephalopathy (inability to think accurately could accompany this) related to intravenous Ceftriaxone."

With respect to the video tape, although appellant received in discovery a composite copy of two original

video tapes, it was not discovered until sometime later that the defense was not in possession of the originals. When this was discovered, appellant requested to see the original containing the ODNR examination of appellant's boat, done the day after the collision. Due to the state's need to examine the original itself, the original tape was not provided to the defense for analysis until approximately April 18, 1996. Appellant asserted that his expert required thirty hours to conduct an analysis of the tape. The trial court denied appellant's request for a continuance of the April 22, 1996 trial date.

This court finds that the trial court did not abuse its discretion in denying appellant's request for a continuance. Hooper did not testify until May 3, 1996, which was several days past the two week period Dr. Myers suggested Hooper not testify. Additionally, Dr. Myers did not say that Hooper suffered from an inability to think accurately while on her medication, only that it may happen. Furthermore, with respect to the original video tapes, defense expert, Steven Caine, did not testify until May 6, 1997; therefore, at a minimum, Caine had eleven business days to complete thirty hours of examination.

Although the trial court would not have known the exact dates these witnesses would be testifying, we find that the trial court did not abuse its discretion by denying appellant's request for continuance of the April 22, 1996

trial date. Appellant's third assignment of error is therefore found not well-taken.

IV.

In his fourth assignment of error, appellant argues that the trial court erred by permitting appellee's lay witnesses to testify as experts and offer expert opinions. Specifically, appellant asserts that although they were not qualified as experts to do so, three of appellee's witnesses, Mike Benfer, Scott Smith and Daniel Clarkson, testified that appellant's watercraft functioned properly.

In support of his argument, appellant relies on Hatfield v. Andermatt (1988), 54 Ohio App.3d 188. In Hatfield, the court found that the trial court erred in allowing a police officer who was not present at the scene, nor qualified as an expert in accident reconstruction, to testify regarding the proximate cause of the accident, how the accident occurred, and who was negligent. Hatfield is distinguishable from this case because Benfer, Clarkson, and Smith did not offer opinions as to what was the proximate cause of the collision or whether appellant was negligent. Rather, each witness was examined on matters within their field of expertise.

Benfer was a service manager at Winke's boat storage on Catawba Island, where the boats were stored immediately after the collision. Prior to being a service manager, Benfer was a mechanic for four years at Winke's. As a service manager, Benfer was responsible for getting

the customers' complaints into a logical format, so the mechanics could understand what the problem was, and do troubleshooting concerning the mechanical problem. Benfer underwent specialized training in marine technologies in high school and went to factory authorized technical schools put on by engine manufacturers of marine engines every winter thereafter for seventeen years. Benfer received over twenty certified mechanic certificates from these training schools, including a number from MerCruiser, the most recent being February 9, 1994, for stern drives and inboards. At the time of trial and at the time of the incident, Benfer was a certified mechanic for MerCruiser.

Benfer testified that after the collision he was asked by ODNR to examine appellant's Cigarette boat to determine if there was any problem with the throttles. Upon examination of appellant's boat, Benfer testified that the only control problems he found with the boat was that the starboard drive shifted into reverse with a little difficulty a couple of times. He found nothing wrong with either the throttles or the port drive. Benfer was then asked the following hypothetical by the state:

> Q. "I want to describe a hypothetical in which a 28 foot Wellcraft is located 65 feet and pointed in a south to southwest direction 65 feet off the eastern marina sea wall at the Casino marina. ***"

Q. "I want to also in that hypothetical describe the situation where a Top Gun Cigarette boat is coming from a southeasterly direction or from a direction of Sandusky or Huron ***."

Q. "And I also want within that hypothetical can you assume that the Cigarette boat literally runs over, launches over the port, front port side of the Wellcraft boat ***.'

Q. "Now, Mr. Benfer, is there anything that you saw in your examination of that Top Gun Cigarette boat which that collision in that hypothetical would be caused by any type of mechanical problem?"

A. "No, Sir."

Q. "Mr. Benfer, is there anything about that starboard gearshift propensity at times to have difficulty going into reverse that would have caused the collision that I described in the hypothetical?"

A. "No, sir."

The defense did not object to this line of questioning.

The state went on to ask Benfer about cavitation. Benfer testified that he found no evidence of cavitation on

the outdrives. He was then asked how cavitation could play a role in the type of collision described in the hypothetical. Benfer responded that cavitation would have no effect whatsoever on the operation of the boat. The defense objected to this line of questioning on the basis that Benfer was not qualified to give such an opinion.

Benfer was then questioned regarding ventilation. He testified that ventilation is when an air pocket forms around the prop. He testified that when this happens, it causes the engine to rev for a split second and the speed of the boat to decrease for that second. Benfer was asked if ventilation could have caused the collision and he responded that it could not. The defense objected to this line of questioning.

Scott Smith was a customer service manager, warranty manager, and quality control manager for the Cigarette Racing Team in North Miami Beach, Florida, which manufactured appellant's boat. Smith drives all the Cigarette boats manufactured by the Racing Team, approximately ninety per year, for quality control purposes.

Smith was examined by the state regarding whether the alleged problems with the Cigarette boat could have caused it to collide with the Wellcraft. Smith testified that the difficulty with shifting the starboard drive into reverse had nothing to do with the boat's speed which is controlled by the throttles and, therefore, would not have caused the Cigarette boat to collide with the Wellcraft. The defense

did not object to Smith's ability to respond to the hypothetical.

Daniel Clarkson was a manager of the fuel and electrical systems for MerCruiser. MerCruiser made the engine and drive system in appellant's boat. As an engineer and manager for the fuel and electrical systems, Clarkson was responsible for the design and calibration of both the fuel system and the electronics of the engines themselves.

The state asked Clarkson if, pursuant to his inspection and examination of the Top Gun Cigarette boat, there was anything that he saw or discovered to a reasonable degree of engineering certainty from a mechanical or engineering standpoint that would have caused the collision to occur. Clarkson testified that there was nothing that he found that would have caused the situation described to him, i.e., that the Cigarette boat launched over the port side of the Wellcraft. The defense objected to these questions on the grounds of his qualifications.

Rulings concerning the admissibility of expert testimony are within the sound discretion of the trial court and will not be disturbed on appeal absent a showing of abuse. Frank v. Vulcan Materials Co. (1988), 55 Ohio App.3d 153, paragraph two of the syllabus. A witness may be qualified as an expert if:

(1) the witness's testimony relates to matters beyond the verdicts. Specifically, appellant asserts that the jury

verdicts are inconsistent as to their finding of recklessness. According to appellant, since the jury convicted him of vehicular homicide, which is predicated upon negligence, instead of aggravated vehicular homicide, which requires reckless behavior, the jury made a finding that appellant had not acted recklessly in causing the death of Scott Brabander. However, the jury then returned verdicts of guilty as to all of the predicate misdemeanor offenses that established involuntary manslaughter. These misdemeanors required findings that appellant acted recklessly. As such, because the jury found in one instance that appellant did not act recklessly, and then in another that he did act recklessly, he asserts that the jury verdicts were inconsistent and should not have been accepted by the trial court.

It is well-settled that separate counts in an indictment are not interdependent and an inconsistent response to different counts do not create an inconsistent verdict:

> "The several counts of an indictment containing more than one count are not interdependent and an inconsistency in a verdict does not arise out of inconsistent responses to different counts, but only arises out of inconsistent responses to the same count. (Browning v. State, 120 Ohio St. 62, approved and followed.)"

State v. Adams (1978), 53 Ohio St.2d 223, paragraph two of the syllabus. See, also, United States v. Powell (1984), 469 U.S. 57, 65, ("It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense.") knowledge or experience of lay persons, (2) the witness is qualified by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony, and (3) the witness's testimony is based on reliable scientific, technical, or other specialized information. Evid.R. 702. The test of the admissibility of expert testimony is whether a particular expert will aid the trier of fact in the search for truth, not whether the expert witness is the best witness on the subject. Ishler v. Miller (1978), 56 Ohio St.2d 447, 453.

In this case, Benfer and Smith had extensive knowledge and experience in boat and engine operation. Clarkson had extensive technical knowledge regarding the workings of fuel and electrical systems. As such, each witness was qualified to testify whether the problems with appellant's boat could have caused the collision described. None of them testified as to what did cause the collision or who was negligent, rather each of their testimony was limited to what effect mechanical problems would have had on the boat's operation. As such, they were not called upon to provide expert testimony as to the cause of the collision.

Upon a thorough review of the record, we find that the trial court did not abuse its discretion in admitting the testimony of Benfer, Clarkson, and Smith. Accordingly, appellant's fourth assignment of error is found not well-taken.

V.

In appellant's fifth assignment of error, he argues that the trial court erred when it accepted inconsistent jury.

Accordingly, even assuming the verdicts are facially at odds, the verdict is not inconsistent because any discrepancy occurs in separate counts, not within the same count. See Adams, supra., Appellant's fifth assignment of error is therefore found not well-taken.

VI.

In his sixth assignment of error, appellant argues that the trial court erred when it presented the jury with an unindicted "additional finding" as to count one, i.e., that appellant was under the influence of alcohol at the time of the offense. As such, appellant asserts that his constitutional rights were violated because he does not have to be held to answering a crime for which the grand jury did not indict. Appellee responds that alcohol consumption with respect to vehicular homicide is an additional finding and not a specification, as suggested by appellant.

Pursuant to the vehicular homicide statute, "[i]f the jury or judge as trier of fact finds that the offender was under the influence of alcohol, *** at the time of the

commission of the offense, then the offenders driver's or commercial driver's license or permit or nonresident operating privileges shall be permanently revoked ***." R.C. 2903.07(B).

The purpose of an indictment is to give the accused person notice that he or she must defend against certain criminal charges and to afford protection from future prosecution for the same offense. State v. Sellards (1985), 17 Ohio St.3d.169, 170. See, also, R.C. 2941.05 and Crim.R. 7(B). In this case, there was no allegation in count one of the indictment that appellant committed aggravated vehicular homicide while under the influence of alcohol. However, in count two of the indictment, appellant was specifically charged with the offense of operating a watercraft under the influence.

Assuming arguendo that the trial court erred in instructing the jury to determine as to count one whether appellant was under the influence of alcohol, the alleged error was harmless. The allegations in both counts of the indictment arose out of the same set of facts and circumstances and, since appellant was charged with being under the influence in count two, he was placed on notice that the state was alleging that he was under the influence at the time of the incident. As such, any error in instructing the jury to make a finding as to whether appellant was under the influence of alcohol during the commission of vehicular homicide was harmless.

Accordingly, this court finds appellant's sixth assignment of error not well-taken.

VII.

In appellant's seventh assignment of error, he argues that his Sixth Amendment right to a fair and impartial jury was violated. Specifically, appellant asserts that he did not have a fair and impartial jury for two reasons: (1) a potential juror had been a member of the U.S. Coast Guard and was questioned about irrelevant matters, such as, the importance of remaining sober while operating a boat, car operation/travel versus boat operation/travel, the effects of drinking alcohol in the sun, and the administration and effectiveness of field sobriety tests; and (2) a seated juror was biased, as evidenced by his negative comments made during the jury selection process.

A potential juror had been a member of the U.S. Coast Guard and was primarily involved in boating safety and law enforcement training for petty officers and officers in the coast guard. Part of his training included boarding procedures and investigation of alleged incidents of boating while intoxicated, which included instruction on administering field sobriety tests. He described the field sobriety tests, as follows:

> "[JUROR]: That's when we have to -- we do that on shore. We tie up the boat, have the person walk on the dock, and they have to do different things, different movements and

> observations, walking in a straight line, using their hands and touch their nose, gaze nystagmus with their eyes, checks on -- checks of that sort to make a determination if the person is impaired."

The juror went on to state that the field sobriety tests were effective in giving a person "probable cause in determining if a person is -- is impaired or not impaired."

The state next questioned the potential juror regarding what is a gaze nystagmus test, whether it involved voluntary or involuntary muscle movement, and how effective the test is in developing probable cause. He responded, "I think it's a tool they can use as part of the other tests that can be used." The state then questioned him concerning why any test needs to be administered at all. The potential juror stated that it was an assessment and that another assessment would be a breathalyzer test. The state questioned him further concerning indications of impairment, which he stated included slurred speech and mannerisms.

At this point appellant objected and argued the following:

> "MR. KIRWAN: - - what the Prosecutor is attempting to do here is to elicit to the jury what the testimony would be, in essence. I mean, he's gone through like gaze nystagmus test. What that means is now

> getting into questions concerning what does that indicate to you. This -- this juror isn't being examined as to what his qualifications for fairness are. He's being used as a tool to instruct the rest of the jury before the trial even begins."

The state responded that it was entitled to inquire of the jurors what they think of when they think of an intoxicated person, what signs do they see. The trial court's solution to appellant's objection was to prohibit the state from using technical terms such as gaze nystagmus test and only speak in layman terms "to feel the jurors out." The state continued questioning this potential juror, but only as to his general experiences, not as to his coast guard experiences. Appellant exercised a preemptory challenge and dismissed this juror.

The purpose of a voir dire examination of a prospective juror is to determine whether he or she has both the statutory qualifications of a juror and is free from bias or prejudice for or against the parties. State v. Crago (1994), 93 Ohio App.3d 621, 641. Crim.R. 24(A) permits the court discretion in determining the method of voir dire and provides in pertinent part that "[t]he court may permit the attorney for the defendant, or the defendant if appearing pro se, and the attorney for the state to conduct the examination of the prospective jurors or may itself conduct the examination." "The scope of voir dire is within the trial

court's discretion and varies depending on the circumstances of each case." State v. Bedford (1988), 39 Ohio St.3d 122, 129. "Any limits placed thereon must be reasonable." Id.

In order to determine the existence of bias or prejudice, it was necessary for the state to determine the extent of the potential juror's knowledge and his opinion regarding the effectiveness of field sobriety tests. Upon review of voir dire, we find that the trial court did not abuse its discretion in allowing the state to question the potential juror in question with respect to his knowledge and opinion of field sobriety tests as such tests were a significant part of this case.

Appellant additionally asserts that he was denied a fair and impartial jury because a seated juror was biased. The allegedly biased juror was brought to the trial court's attention several days into the trial by a juror who was not ultimately seated. The juror stated to the trial court and counsel that a seated juror had made negative comments about the defense team during voir dire and that she felt the seated juror was biased.

The trial court questioned the allegedly biased juror regarding what he had said. The juror stated that whatever comments he made were only jokes. He further stated that the comments were made prior to him being selected as a juror that he felt he could be fair and impartial in deciding appellant's case, and that he had not formed any opinions. The trial court admonished the juror not to make any

further comments regarding the case. Shortly thereafter, the allegedly biased juror was dismissed and replaced with an alternate juror.

Even assuming that the juror's comments equating the defense team to the Three Stooges, and complaints about the speed with which voir dire was proceeding, indicated a prejudice on his part, he did not deliberate to a verdict. Therefore, we find that appellant was not denied a fair and impartial jury.

Accordingly, appellant's seventh assignment of error is found not well-taken.

VIII.

Appellant argues in his eighth assignment of error that the trial court abused its discretion in failing to consider the sentencing criteria of R.C. 2929.12 and by sentencing him to the maximum term of incarceration permitted by law.

Appellant's eighth assignment of error is rendered moot by this court's ruling as to the first assignment of error, remanding the case for resentencing. Upon remand, the trial court will have to reconsider the sentencing criteria for the resentencing, as such, appellant's eighth assignment of error is found not well-taken.

IX.

Appellant argues in his ninth assignment of error that the trial court committed prejudicial, reversible error when it denied his motion to dismiss Count Two,

involuntary manslaughter, and permitted appellee to prosecute appellant for both aggravated vehicular homicide and involuntary manslaughter. Appellant asserts that the inclusion of both charges violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Sections 2, 9, and 16, Article I, Ohio Constitution.

Based on the majority opinion in State v. Chippendale (1990), 52 Ohio St.3d 118, and our discussion as to Assignment of Error Number One, appellant's ninth assignment of error is found not well-taken.

X.

Appellant argues in his tenth assignment of error that he was denied a fair trial because the trial court allowed into evidence testimony regarding appellant's character, in contravention to Evid.R. 401, 402, 403 and 404. Specifically, appellant refers to testimony regarding appellant's "alleged watercraft piloting behavior and drinking behavior on occasions removed by time and location from the accident in question." Appellant asserts that he did not testify in his own defense and, therefore, character testimony should have been excluded. He also asserts that any probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and/or misleading the jury.

Without specific reference to the transcript, this court can only speculate on the testimony appellant calls

into question. The jury was presented with testimony regarding what appellant was drinking prior to the collision, e.g., Bob Vitt and Sheila Sikora testified that appellant was drinking between 10:30 and 11:00 a.m. at the Casino and Rory Kaip testified that he served appellant and Ron Liguzinski each a Sidecar at the Twine House. Appellant's piloting of his boat after he began drinking was also called into question, e.g., Michael Hutsler testified that appellant took off at a high rate of speed, approximately thirty-five feet from the dock at the Casino, when leaving Kelley's Island at 11:30 a.m., Martin Fuchs testified that appellant's boat ran into "Bad Dog" when appellant was leaving Kelley's Island around 11:30 a.m., and Sheila Sikora testified that appellant traveled fast through a no wake zone on the Huron River while approaching Twine House. And, finally, Lauren and Kenneth Helbling and Michael Hutsler testified that people on the boat were pouring a gold liquid out of cups over the side of the boat after the collision.

The trial court has broad discretion in the admission of evidence and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, appellate courts should be slow to interfere." State v. Jenks (1991), 61 Ohio St.3d 259, 281, citing, State v. Maurer, (1984), 15 Ohio St.3d 239, 265. Evid.R. 404(B) provides in pertinent part that:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a

person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

"Prosecutors and trial courts should be particularly aware that evidence of other acts of a defendant is admissible only when it 'tends to show' one of the matters enumerated in the statute and only when it is relevant to proof of the guilt of the defendant of the offense in question." (Emphasis in original.) State v. Burson (1974), 38 Ohio St.2d 157, 158.

In this case, the testimony presented was relevant as to the question of whether appellant was intoxicated at the time of the incident. Testimony regarding his consumption of alcoholic beverages prior to the incident and his ability to operate his boat after drinking alcoholic beverages are all probative of whether appellant was intoxicated at the time of the collision and whether he was operating his boat recklessly or negligently because of such alleged intoxication.

The testimony in question all related to evidence of alcohol consumption or intoxication on the day in question. As such, the testimony was not offered as character evidence to prove that appellant acted in conformity with behavior which occurred on some other occasion. Furthermore, upon reviewing the entire record, this court

finds that the probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury.

Accordingly, we find that the trial court did not abuse its discretion in allowing the state to question witnesses regarding appellant's "drinking" and "piloting" on the day in question. Appellant's tenth assignment of error is therefore found not well-taken.

XI.

Appellant argues in his eleventh assignment of error that the trial court erred in permitting the state to cross-examine defense witnesses by using grand jury transcripts of their prior testimony.

The disclosure of grand jury testimony is governed by Crim.R. 6(E) and the release of any such testimony for use prior to or during trial is within the discretion of the trial court. State v. Greer (1981), 66 Ohio St.2d 139, paragraph one of the syllabus. Crim.R. 6(E) states that, except for deliberations of the grand jury and the vote of any grand juror, "[d]isclosure of other matters occurring before the grand jury may be made to the prosecuting attorney for use in the performance of his duties." The rule further states that "[a] *** prosecuting attorney *** may disclose matters occurring before the grand jury, other than the deliberations of a grand jury or the vote of a grand juror, *** in connection with a judicial proceeding." Crim.R. 6(E). "If the State chooses to impeach a defense

witness with his grand jury testimony, then the defendant has a right, upon timely request, to view the relevant portions of the witness' [sic] grand jury testimony in order to confirm the alleged contradiction." State v. Hoofer (July 12, 1996), Montgomery App. No. 15345, unreported.

In this case, the state used the grand jury testimony of two defense witnesses during cross-examination. Specifically, the state used Sandra Hooper's grand jury testimony to examine her concerning allegedly inconsistent trial testimony regarding how many drinks were brought upon appellant's boat, whether appellant adjusted his throttles during the trip back to Kelley's Island, and whether she told the grand jury that the throttles were stuck. Additionally, the state used Ronald Liguzinski's testimony during cross-examination regarding whether appellant brought a drink onto his boat when they were leaving the Casino at Kelley's Island and whether it would take a boat traveling twenty to twenty-five miles per hour, two hundred to two hundred fifty feet to stop.

During the cross-examination of these witnesses, the defense did not object to the use of the grand jury testimony. Rather, the only objection made was that the jury should be told that the grand jury process is an intimidating formal proceeding and that the defense is not present. Moreover, a copy of the relevant portions of the grand jury proceedings being used during cross-examination was provided to the defense.

Based on the foregoing, we find that the trial court did not err in permitting the state to cross-examine defense witnesses with their grand jury testimony. The state is permitted to use such testimony in judicial proceedings and the defense was provided a copy of the relevant testimony. See Crim.R. 6(E) and State v. Hopfer, supra.

Accordingly, appellant's eleventh assignment of error is found not well-taken.

XII.

Appellant argues in his twelfth assignment of error that his rights were violated when the state altered the positioning of the controls of appellant's watercraft and tampered with evidence.

The United States Supreme Court held in Arizona v. Youngblood (1988), 488 U.S. 51, 57, that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."

In Ohio, anyone who violates R.C. 2921.12 is guilty of tampering with evidence. R.C. 2921.12 states, in part:

> "(A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:
>
> "(1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to

impair its value or availability as evidence in such proceeding or investigation;

"(2) Make, present, or use any record, document, or thing, knowing it to be false and with purpose to mislead a public official who is or may be engaged in such proceeding or investigation, or with purpose to corrupt the outcome of any such proceeding or investigation."

Mike Benfer, a mechanic at Winke's, was asked by the ODNR to determine if there was a problem with the throttles of appellant's boat. Benfer examined appellant's boat while Officer Steinbauer of the ODNR videotaped.

Benfer testified that he started the engines on appellant's boat one at a time because it was on dry dock and a hose had to be connected to the engine in order to run it. He moved the throttles and the drives to test their operation. Benfer testified that the throttles moved freely, but the starboard drive had an intermittent difficulty shifting into reverse. Benfer found a loose cable connector which could have accounted for the shifting trouble.

Benfer testified that he was going to tighten the cable to determine if it was the cause of the shifting problem:

"My next step in troubleshooting why that gear case shifted hard would have been to tighten that piece up and go back to the

> control handle and shift it and see if that solved the problem. That was what I was going to attempt to do. At that point, Mr. Steinbauer said no, let's not change anything, let's leave it like it was and that's what we did."

The video showed Benfer attempting to tighten the cable. Benfer testified that it was a hex nut and that he only turned it one flat, i.e., one-sixth of a turn, and that the cable was still in the same loose state in which he had originally found it.

We find that appellant's due process rights were not violated. See Youngblood, supra. There is no showing that the state acted in bad faith by requesting that the throttles be moved in order to determine their ability to operate. Nor is there any showing of bad faith with respect to Benfer turning the hex nut one flat. The fact that these things were done were never concealed from appellant as the video tape of Benfer's examination was provided to appellant. Accordingly, we find that there was no violation of the Due Process Clause.

Additionally, there is no showing that Benfer intended to alter, destroy, or conceal any item, with the purpose of impairing its value or availability as evidence. Benfer candidly testified that he was "troubleshooting," in that he was attempting to determine the cause of the problem with the starboard drive when he started to tighten

the nut. As far as the movement of the throttles, the record is devoid of any indication that this was requested by the ODNR or done by Benfer in an attempt to alter, destroy, or conceal, evidence. Accordingly, we find that no one tampered with the evidence in this case. See R.C. 2921.12.

Accordingly, we find appellant's twelfth assignment of error not well-taken.

XIII.

Appellant argues in his thirteenth assignment of error that the verdicts were against the manifest weight of the evidence and contrary to law.

Appellant was found guilty of vehicular homicide, in violation of R.C. 2903.07, and involuntary manslaughter, in violation of R.C. 2903.04(B), as a proximate result of committing one or more of the following misdemeanor offenses: operating a watercraft while under the influence, a violation of R.C. 1547.11(A) (1); reckless operation, a violation of R.C. 1547.07; safe speed, a violation of Ohio Adm.Code 1501:47-2-06; action to avoid collision, a violation of Ohio Adm.Code 1501:47-2-08; and crossing situation, a violation of Ohio Adm.Code 1501:47-2-15.

In State v. Jenks (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, the Ohio Supreme Court set forth the standard applied in determining whether a criminal conviction is against the manifest weight of the evidence:

> "An appellate court's function when reviewing the sufficiency of the evidence to

> support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. (Jackson v. Virginia [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)"

With respect to appellant's conviction of the crime of vehicular homicide, R.C. 2903.07 states that anyone who negligently causes the death of another while operating or participating in the operation of a watercraft is guilty of vehicular homicide, a misdemeanor of the first degree.

In this case, the jury heard testimony that appellant had been drinking Sidecars between 10:00 a.m. and, as late as, 3:00 p.m., that he was traveling fifty m.p.h. approximately one hundred yards from the dock area at Kelley's Island, that he was turned around in his bolster seat talking to the occupants of his boat, that he noticed the Brabander boat just before the collision, that he pulled back on the throttles, slowing the boat to twenty-five to forty m.p.h., thereby causing the boat's bow to porpoise up and

hit the Brabander boat on the port side, fly over it, and land in the water on the other side.

The jury also heard testimony that Scott Brabander died as a result of multiple blunt force injuries, resulting in twelve broken ribs and a lacerated pulmonary artery and airway. Dr. Cynthia Beisser testified that the injuries were a result of a heavy blow to the left side of Scott's back, not merely from hitting the water or jumping out of a boat--"he would have had to fall on something very hard or something hit him very hard."

Based on the evidence in this case, we find that there is evidence upon which a jury could rely to find that appellant negligently caused the death of Scott Brabander while operating a watercraft. As such, we find that after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime of vehicular homicide proven beyond a reasonable doubt. See Jenks, supra.

In order for appellant to be convicted of involuntary manslaughter, pursuant to R.C. 2903.04(B), the evidence must show that appellant caused the death of another as a proximate result of committing or attempting to commit a misdemeanor of the first, second, third, or fourth degree or a minor misdemeanor. In this case, there were five misdemeanor charges for which appellant was found guilty.

Appellant was first found guilty of operating a watercraft while under the influence of alcohol in violation

of R.C. 1547.11(A) (1), which provides that no person shall operate or be in physical control of any vessel underway while under the influence of alcohol. "'[O]perate' means that a vessel is being used on the water in this state when the vessel is not securely affixed to a dock or to shore or to any permanent structure ***."

In this case, the uncontroverted evidence was that appellant was driving his boat at the time of the collision. The jury also heard testimony that appellant was drinking alcoholic beverages prior to the collision; Bob Vitt testified that appellant drank tow Sidecars from 10:30 a.m. to 11:00 a.m. at the Casino on Kelley's Island; sheila Sikora testified that she saw appellant consuming a Sidecar at the Casino; and Rory Kaip testified that he made at least one Sidecar for appellant at the Twine House.

The jury also heard evidence that appellant was observed to be intoxicated after the collision: Brian Hoke testified that within one-half hour after the collision, appellant had trouble keeping his balance while walking, smelled of alcohol, and had bloodshot eyes and a flushed face. Hoke, a third class petty officer in the U.S. Coast Guard also testified that appellant failed the field sobriety test administered at the Kelley's Island police station. Hoke testified that appellant incorrectly performed the field sobriety test, as follows: (1) appellant sang the ABC's rather than speaking them; (2) he hesitated between numbers when counting from twenty-five to one; (3) he was

unable to touch his thumb to his fingers while counting from one to four--his fingers slid around, he miscounted and he did not speed up his counting during the test as instructed; (4) he failed in his performance of the palm pat test because his hands slid around, he did not lift his hands high enough, he hesitated, and he did not speed up during the examination as instructed; (5) he incorrectly performed the finger to nose test by missing his nose, opening his eyes, hesitating, and using the wrong finger; (6) appellant was unable to walk heal to toe for nine steps, while counting, in a straight line--he lost his balance, started before he was told to begin, turned improperly, and raised his arms to keep his balance; (7) had some trouble keeping his balance while standing on one foot and counting to thirty; and (8) appellant failed a horizontal gaze nystagmus test ("HGN") when four of the six possible indicators of intoxication were found to be present. Based on his observations and the results of the field sobriety test, Hoke testified that appellant was intoxicated.

The jury also heard the testimony of Officer John Johnston of the ODNR. Johnston testified that he first encountered appellant at the Kelley's Island police station where he noted a strong odor of alcoholic beverages, bloodshot eyes and a flushed face. Johnston also performed a HGN test and found six out of six indicators of intoxication, i.e., lack of smooth pursuit in both eyes,

nystagmus (jerking at maximum deviation) in both eyes, and nystagmus before forty-five degrees in both eyes.

Based on the evidence in this case, we find that a rational trier of fact could have found that appellant was operating his watercraft while under the influence of alcohol.

Appellant was also found guilty of recklessly operating a vessel, in violation of R.C. 1547.07(A) which states that "[a]ny person who operates any vessel *** on the waters in this state carelessly or heedlessly, or in disregard of the rights or safety of any person, vessel, or property, or without due caution, at a rate of speed or in a manner so as to endanger any person, vessel, or property is guilty of reckless operation of the vessel or other device."

John Brabander testified that appellant's boat was traveling fifty m.p.h. approximately one hundred yards from the dock at Kelley's Island. Dick Layland testified that appellant's boat was traveling forty-five to fifty m.p.h. one-quarter mile from the dock, that appellant was driving and was turned sideways with his left arm around the back of his seat talking with the passengers on his boat, and that two to two-half boat lengths from the Brabander's boat, appellant turned around forward, put his hand on the throttle and pulled down, slowing the boat to thirty-five m.p.h. immediately before impact. William Leachman testified substantially the same as Layland, but had appellant pulling back on the throttles three to four boat

lengths from the Brabander's boat, thereby slowing the boat to thirty-five to forty m.p.h. at time of impact.

Based on the evidence in this case, a rational trier of fact could find that the essential elements of reckless operation were proven beyond a reasonable doubt, i.e., that appellant operated his vessel carelessly or heedlessly, or in disregard of the rights or safety of any person, vessel, or property, or without due caution, at a rate of speed or in a manner so as to endanger any person, vessel, or property.

Appellant was also found guilty of failing to operate his vessel at a safe speed, in violation of Ohio Adm.Code 1501:47-2-06, which provides that no person shall operate or permit to be operated, any vessel on the waters in this state, in violation of this rule:

> "Every vessel shall at all times proceed at a safe speed so that it can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions.

In determining a safe speed, traffic density and maneuverability are factors to be taken into account. Ohio Adm.Code 1501:47-2- 06(A). "For the purposes of this rule the term 'collision' includes every description of accident or casualty either intentional or unintentional." Ohio Adm.Code 1501:47-2-06.

Ron Liguzinski testified upon cross-examination that even traveling twenty to twenty-five m.p.h., appellant's boat

would have taken two hundred to two hundred fifty feet to stop. Witnesses testified that appellant pulled back on the throttles between two and four boat lengths from the Brabander's boat, leaving appellant with only seventy-six to one hundred fifty two feet within which to stop his boat. Based on the testimony in this case, a rational trier of fact could find that appellant failed to proceed at a safe speed so that he could have taken proper and effective action to avoid the collision with the Brabander's boat.

The jury also found appellant guilty of failing to avoid a collision, in violation of Ohio Adm.Code 1501:47-2-08, which states that no person shall operate any vessel on the waters in this state, in violation of this rule:

> "(A) Any action taken to avoid collision shall, if the circumstances of the case admit, be positive, made in ample time and with due regard to the observance of good seamanship.
>
> "(B) Any alteration of course or speed to avoid collision shall, if the circumstances of the case admit, be large enough to be readily apparent to another vessel observing visually or by radar; a succession of small alterations of course or speed should be avoided.
>
> "(C) If there is sufficient sea room, alteration of course alone may be the most effective action to avoid a close-quarters situation

provided that it is made in good time, is substantial and does not result in another close-quarters situation.

"(D) Action taken to avoid collision with another vessel shall be such as to result in passing at a safe distance. The effectiveness of the action shall be carefully checked until the other vessel is finally past and clear.

"(E) If necessary to avoid collision or allow more time to assess the situation, a vessel shall slacken its speed or take all way off by stopping or reversing its means of propulsion."

In this case, there was ample testimony upon which a rational trier of fact could rely to find that appellant failed to avoid a collision with the Brabander's boat. It was a clear day, by everyone's account. Because witnesses at the Casino spotted appellant one hundred yards or further from the dock, a jury could find that appellant could have seen the Brabander's boat an equal distance away and, therefore, would have had time to alter his course, or stop, in order to avoid the collision.

The jury also found appellant guilty of violating a crossing situation as set forth in Ohio Adm.Code 1501:47-2-15, which provides that no one shall operate any vessel in violation of this rule:

"(A) When two power-driven vessels are crossing so as to involve risk of collision, the vessel which has the other on its starboard side shall keep out of the way and shall, if the circumstances of the case admit, avoid crossing ahead of the other vessel. ***"

Officer Johnston testified that a vessel must yield the right of way to any other vessel which is directly ahead or off to the starboard side. In this case, the evidence supports that the Brabander's boat was directly in the path of appellant's boat and was struck on the port side. As such, a rational trier of fact could find that appellant violated a crossing situation by failing to avoid the Brabander's boat which had the right-of-way.

Notwithstanding the fact that appellant argued that his throttles stuck, making the collision unavoidable, there was ample evidence that, if believed, would convince the average mind of appellant's guilt beyond a reasonable doubt. As such, after a thorough review of the record, we find that there is evidence upon which a rational jury could rely to find that appellant operated his vessel while under the influence of alcohol, recklessly operated his vessel, did not operate within a safe speed, failed to avoid a collision, and violated the rule with respect to a crossing situation. Accordingly, we find that after viewing the evidence in a light most favorable to the prosecution, any rational trier of

fact could have found the essential elements of the crimes proven beyond a reasonable doubt. See Jenks, supra.

Since the misdemeanor convictions are supported by the evidence in this case, so also is appellant's conviction as to involuntary manslaughter. There is ample evidence upon which a rational jury could rely to find that violating the above misdemeanor offenses proximately caused the death of Scott Brabander.

Accordingly, we find that the verdicts were not against the manifest weight of the evidence. Appellant's thirteenth assignment of error is therefore found not well-taken.

XIV.

Appellant argues in his fourteenth assignment of error that the cumulative effect of all the alleged assignments of error denied appellant his right to a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, as well as Sections 10 and 16, Article I, Ohio Constitution.

Generally, although singular violations of the Rules of Evidence during trial may not rise to the level of prejudicial error, a conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial. State v. DeMarco (1987), 31 Ohio St.3d 191, paragraph two of the syllabus.

This court has thoroughly examined and ruled on each assignment of error presented by appellant. Having

found a problem only with the trial court's sentencing, we find no cumulative effect of errors that would have violated appellant's right to a fair trial. Accordingly, appellant's fourteenth assignment of error is found not well-taken.

CONCLUSION

On consideration whereof, this court finds that appellant was not prejudiced or prevented from having a fair trial; however, we find that the trial court erred in sentencing. Therefore, the judgment of the Erie County Court of Common Pleas is affirmed, in part, and reversed, in part. This matter is remanded to the trial court for resentencing consistent with this opinion. Court costs of this appeal are assessed to appellee.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART.

State v. Ollie Mastronardi
C.A. No. E-96-033

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also 6th Dist.Loc.App.R. 4, amended 7/1/92.

Peter M. Handwork. J.	/s/ Peter M. Handwork
	JUDGE
George M. Glasser, J.	/s/ George M. Glasser
	JUDGE
Richard W. Knepper. J.	/s/ Richard W. Knepper
CONCUR.	JUDGE

IN THE COMMON PLEAS COURT
OF ERIC COUNTY, Ohio

Filed
96 MAY 24 PM 3:59
Erie County
Common Pleas Court

THE STATE OF OHIO, *Plaintiff,*	:	**Case No. 95-CR-371**
vs.	:	**Judge Ann B. Maschari**
Ollie Mastronardi, *Defendant.*	:	**JUDGMENT ENTRY**

On the 24th day of May, 1996, came the Prosecuting Attorney on behalf of the State of Ohio and also came the defendant in person and represented by counsel, John Kirwan, Michael Henneberg and Patrick Ducharme; defendant was advised of his right to appeal within thirty (30) days of the sentence; defendant, as to Count No. 1, having been indicted for the offense of Aggravated Vehicular Homicide [§2903.06], heretofore was found "guilty" by a jury of his peers of Vehicular Homicide while under the influence of alcohol [M-a; §2903.07], a lesser included offense of Aggravated Vehicular Homicide, subject to a maximum penalty of six (6) months; defendant, as to Count No. 2, heretofore was found "guilty" by a jury of his peers to the offense of Involuntary Manslaughter as a result of committing the following misdemeanors, to wit: operating a watercraft under the influence of alcohol; crossing situation; action to avoid collisions; safe speed; and reckless operation [AgF-3; O.R.C. §2903.04] subject to a penalty of 2, 3, 4 or 5 to 10 years; further, the Court having before it a presentence investigation report inquired of the defendant if he had anything

to say why judgment should not be pronounced against him and the defendant made a statement.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Defendant, as to Count No. 1, for the offense of VEHICULAR HOMICIDE, a first degree misdemeanor in violation of §2903.07 of the Ohio Revised Code, be sentenced to the Erie County Jail at Sandusky, Ohio to be imprisoned and confined for a definite sentence for the term of six (6) months; defendant, as to Count No. 2, for the offense of INVOLUNTARY MANSLAUGHTER, an aggravated felony of the third degree in violation of §2903.04 of the Ohio Revised Code, be sentenced to the Department of Rehabilitation and Correction and conveyed to the Lorain Correctional Institution at Grafton, Ohio to be imprisoned and confined for an indeterminate sentence for the term of not less than five (6) years no more than ten (10) years; said sentence shall run concurrent; defendant shall receive 18 days credit for time served as of May 24, 1996; and defendant shall pay the costs of this prosecution for which execution is awarded.

/s/ Judge Ann B. Maschari

Approved:

/s/ Kevin J. Baxter
Prosecuting Attorney

INDICTMENT
Crim. Rule 6,7

Filed
95 JUL 7 PM 3:31
Erie County
Common Pleas Court

THE STATE OF OHIO

Erie County, ss. **COURT OF COMMON PLEAS**

Of the Term Jan/July Session in the year one thousand and nine hundred ninety-five.

THE JURORS OF THE GRAND JURY of the State of Ohio, within and foer the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that on or about the 24th day of June, 1995, at Erie County, Ohio, Ollie Mastronardi did recklessly cause the death of Scott Bradander while the said Ollie Mastronardi was operating a watercraft, in violation of O.R.C. § 2903.06(A) and against the peace and dignity of the State of Ohio (AgF-3).

COUNT TWO

That on or about the 24th day of June, 1995 at Erie County, Ohio, Ollie Mastronardi did cause the death of Scott Bradander as a proximate result of the said Ollie Mastronardi committing one or more of the following misdemeanor offenses: Operating a Watercraft Under the Influence [O.R.C. § 1547.11(A)(1)]; Reckless Operation [O.R.C. § 1547.07]; Safe Speed [Ohio Admin. Code § 1501.47-2-06]; Action to Avoid

Collision [Ohio Admin. Code § 1501.47-2-08]; and Crossing Situation [Ohio Admin. Code § 1501.47-2-15], in violation of O.R.C. § 2903.04(B) and against the peace and dignity of the State of Ohio (AgF-3).

/s/ Kevin P. Boxter
Procesuting Attorney

OHIO CONSTITUTION

Ohio Const. I § 10 Rights of criminal defendants.

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No personal shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be

subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

(1912 constitutional convention, am. eff. 1-1-13; 1851 constitutional convention, adopted eff. 9-1-1851).

OHIO REVISED CODE

§2903.04 Involuntary manslaughter.

(A) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a felony.

(B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a misdemeanor of the first, second, third, or fourth degree or a minor misdemeanor.

(C) Whoever violates this section is guilty of involuntary manslaughter. Violation of division (A) of this section is an aggravated felony of the first degree. Violation of division (B) of this section is an aggravated felony of the third degree.

(D)(1) In addition to any penalty imposed upon the offender under division (C) of this section and section 2929.11 of the Revised Code, if an offender is convicted of or pleads guilty to a violation of division (A) or (B) of this section and if the felony or misdemeanor that the offender committed or attempted to commit, that proximately resulted in the death of the other person; and that is the

basis of the offender's violation of division (A) or (B) of this section included, as an element of that felony or misdemeanor offense, the offender's operation or participation in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft while he was under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, one of the following apply:

(a) The offender's diver's or commercial driver's license or permit or nonresident operating privilege shall be permanently revoked pursuant to section 4507.16 of the Revised Code;

(b) The offender is not eligible for shock probation, probation, or shock parole pursuant to section 2947.061, 2951.02, or 2967.31 of the Revised Code if any of the following apply relative to the offender:

(i) He previously has been convicted of or pleaded guilty to a violation of division (A) or (B) of this section in which the felony or misdemeanor that he committed or attempted to commit, that proximately resulted in the death of the other person, and that is the basis of the offender's violation of division (A) or (B) of this section included, as an element of that felony or misdemeanor offense, his operation or participation in the operation of a motor

vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft while he was under the influence of alcohol, a drug of abuse;

(ii) He previously has been convicted of or pleaded guilty to a violation of a municipal ordinance that is substantially similar to division (A) or (B) of this section and if the felony or misdemeanor that the offender committed or attempted to commit, that proximately resulted in the death of the other person and that is the basis of the offender's violation of division (A) or (B) of this section included, as an element of that felony or misdemeanor offense, the offender's operation or participation in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft while he was under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse;

(iii) He previously has been convicted of or pleaded guilty to a violation of section 1547.11, 2903.06, 2903.07, 2903.08, 4511.19, or 4511.192 of the Revised Code, division (B) or (D) of section 4507.02 of the Revised Code, section 4507.38 or 4507.39 of the Revised Code as those sections existed prior to September 24, 1986, a municipal ordinance that is substantially similar to section 2903.06, 2903.07, 2903.08, 4511.19, or 4511.192 of the Revised Code, or a municipal ordinance that is substantially similar

to section 4507.38 or 4507.39 of the Revised Code as those sections existed prior to September 24, 1986;

(iv) He has accumulated twelve points pursuant to section 4507.021 of the Revised Code within one year of the offense;

(v) He was driving under suspension at the time he committed the offense.

(2) In determining, for the purposes of division (D)(1) of this section, whether an offender was under the influence of alcohol, a drug of abuse, or alcohol and a drug abuse at the time of the commission of his violation of division (A) or (B) of this section, the trier of fact may consider as competent evidence the concentration of alcohol in the offender's blood, breath, or urine as shown by a chemical test taken pursuant to section 1547.111 or 4511.191 of the Revised Code may be considered as competent evidence and the offender shall be presumed to have been under the influence of alcohol if there was at the time the bodily substance was withdrawn for the chemical test a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath, or fourteen-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his urine.

(1994 H 236, eff. 9-29-94; 1993 S 62, § 4, eff. 9-1-93; 1992 S 275; 1982 H 269, § 4, S 199; 1972 H 511).

§2903.06 Aggravated vehicular homicide; effects upon penalties; repeat offenders.

(A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall negligently cause the death of another.

(B) Whoever violates this section is guilty of vehicular homicide, a misdemeanor of the first degree. If the offender previously has been convicted of an offense under this section, section 2903.07 or 2903.08 of the Revised Code, or section 2903.04 of the Revised Code in a case in which the offender was subject to the sanctions described in division (D) of that section, vehicular homicide is a felony of the fourth degree.

If the jury or judge as trier of fact finds that the offender was under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, at the time of the commission of the offense, then the offender's diver's or commercial driver's license or permit or nonresident operating privileges shall be permanently revoked pursuant to section 4507.16 of the Revised Code.

When the trier of fact determines whether the offender was under the influence of alcohol, a drug of

abuse, or alcohol and a drug abuse, the concentration of alcohol in the offender's blood, breath, or urine as shown by a chemical test taken pursuant to section 1547.111 or 4511.191 of the Revised Code may be considered as competent evidence and the offender shall be presumed to have been under the influence of alcohol if there was at the time the bodily substance was withdrawn for the chemical test a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath, or fourteen-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his urine.

(C) If the offender previously has been convicted of or pleaded guilty to a violation of this section, section 2903.04 of the Revised Code in a case in which the offender was subject to the sanctions described in division (D) of that section, section 1547.11, 2903.07, 2903.08, 4511.19, or 4511.192 of the Revised Code, division (B) or (D) of section 4507.02 of the Revised Code, section 4507.38 or 4507.39 of the Revised Code as those sections existed prior to September 24, 1986, a municipal ordinance that is substantially similar to this section, section 2903.07, 2903.08, 4511.19, or 4511.192 of the Revised Code, a municipal ordinance that is substantially similar to section 4507.38 or 4507.39 of the Revised Code as those sections existed prior to September 24, 1986, or a municipal ordinance that is substantially similar to section 2903.04 of

the Revised Code in a case in which the offender would have been subject to the sanctions described in division (D) of that section had he been convicted of a violation of that section, if the offender has accumulated twelve points pursuant to section 4507.021 of the Revised Code within one year of the offense, or if in the commission of the offense the offender was driving under suspension or operating a motor vehicle while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, he shall not be eligible for shock probation, probation, or shock parole pursuant to section 2947.061, 2951.02 or 2967.31 of the Revised Code.

(1993 S 62, § 4, eff. 9-1-93; 1992 S 275; 1990 S 131; 1989 H 381; 1986 S 262, H 428, S 356, H 265; 1982 S 432; 1973 H 716; 1972 H 511).

§2903.07 Vehicular homicide; effects upon penalties of being under influence of alcohol or drug of abuse; repeat offenders.

(A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall negligently cause the death of another.

(B) Whoever violates this section is guilty of vehicular homicide, a misdemeanor of the first degree. If the offender previously has been convicted of an offense under this section, section 2903.06 or 2903.08 of the Revised Code, or section 2903.04 of the Revised Code in a case in which the offender was subject to the sanctions described in division (D) of that section, vehicular homicide is a felony of the fourth degree.

If the jury or judge as trier of fact finds that the offender was under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, at the time of the commission of the offense, then the offender's diver's or commercial driver's license or permit or nonresident operating privileges shall be permanently revoked pursuant to section 4507.16 of the Revised Code.

When the trier of fact determines whether the offender was under the influence of alcohol, a drug of abuse, or alcohol and a drug abuse, the concentration of alcohol in the offender's blood, breath, or urine as shown by a chemical test taken pursuant to section 1547.111 or 4511.191 of the Revised Code may be considered as competent evidence and the offender shall be presumed to have been under the influence of alcohol if there was at the time the bodily substance was withdrawn for the chemical test a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath, or fourteen-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his urine.

(C) If the offender previously has been convicted of or pleaded guilty to a violation of this section, section 2903.04 of the Revised Code in a case in which the offender was subject to the sanctions described in division (D) of that section, section 1547.11, 2903.06, 2903.08, 4511.19, or 4511.192 of the Revised Code, division (B) or (D) of section 4507.02 of the Revised Code, section 4507.38 or 4507.39 of the Revised Code as those sections existed prior to September 24, 1986, a municipal ordinance that is substantially similar to this section, section 2903.08, 4511.19, or 4511.192 of the Revised Code, a municipal ordinance that is substantially similar to section 4507.38 or 4507.39 of the Revised Code as those sections existed prior

to September 24, 1986, or a municipal ordinance that is substantially similar to section 2903.04 of the Revised Code in a case in which the offender would have been subject to the sanctions described in division (D) of that section had he been convicted of a violation of that section, if the offender has accumulated twelve points pursuant to section 4507.021 of the Revised Code within one year of the offense, or if in the commission of the offense the offender was driving under suspension or operating a motor vehicle while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, he shall not be eligible for shock probation, probation, or shock parole pursuant to section 2947.061, 2951.02 or 2967.31 of the Revised Code.

(1993 S 62, § 4, eff. 9-1-93; 1992 S 275; 1990 S 131; 1989 H 381; 1986 S 262, H 428, S 356, H 265; 1982 S 432; 1973 H 716; 1972 H 511).

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(Effective 1791)

Comparative Legislation

Search and seizure, Ohio Const. art. I, § 14.

AMENDMENT V

No personal shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of

law; nor shall private property be taken for public use, without just compensation.

(Effective 1791)

Comparative Legislation

Compensation for taking for public use, Ohio Const. art I, § 19.

Double jeopardy, Ohio Const. art. I, § 10.

Due process, Ohio Const. art I, § 16.

Indictment by grand jury, Ohio Const. art. I, § 10.

Self-incrimination, Ohio Const. art. I, § 10.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

(Effective 1791)

Comparative Legislation

Compulsory process, Ohio Const. art. I, § 10.

Confronting witnesses, Ohio Const. art. I, § 10.

Nature of charge, Ohio Const. art. I, § 10.

Right to counsel, Ohio Const. art. I, § 10.
Right to trial by jury, Ohio Const. art. I, § 5.
Speedy and public trial by jury, Ohio Const. art. I, § 10.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
(Effective 1791)

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws.
Comparative Legislation.
Due process, Ohio Const. art. I, § 16.
Equal Protection, Ohio Const. art. I, § 2.

SECTION 2. Representatives shall be apportioned among the several States according to their respective

numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Comparative Legislation

Apportionment, Ohio Const. art XI §§ 1, 2, 3.

SECTION 3. No personal shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each house, remove such

disability.

Comparative Legislation

Qualification for office, Ohio Const. art II, § 5.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Comparative Legislation

Public Debt, Ohio Const. art. VIII. §§ 1, 3.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

(Effective 1868)

RULE 6. The Grand Jury.

(A) Summoning grand juries. The judge of the court of common pleas for each county, or the administrative judge of the general division in a multi-judge court of common please or a judge designated by him, shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of nine members, including the foreman, plus not more than five alternates.

(B) Objections to grand jury and to grand jurors.

(1) Challenges. The prosecuting attorney, or the attorney for a defendant who has been held to answer in the court of common pleas, may challenge the array of jurors or an individual juror on the ground that the grand jury or individual juror was not selected, drawn, or summoned in accordance with the statutes of this state. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

(2) Motion to dismiss. A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not

previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified, it appears from the record kept pursuant to subdivision (C) that seven or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

(C) Foreman and deputy foreman. The court may appoint any qualified elector or one of the jurors to be foreman and one of the jurors to be deputy foreman. The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record with the clerk of court, but the record shall not be made public except on order of the court. During the absence or disqualification of the foreman, the deputy foreman shall act as foreman.

(D) Who may be present. The prosecuting attorney, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

(E) Secrecy of proceedings and disclosure. Deliberations of the grand jury and the vote of any grand

juror shall not be disclosed. Disclosure of other matters occurring before the grand jury may be made to the prosecuting attorney for use in the performance of his duties. A grand juror, prosecuting attorney, interpreter, stenographer, operator of a recording device, or typist who transcribes recorded testimony, may disclose matters occurring before the grand jury, other than the deliberations of a grand jury or the vote of a grand juror, but may disclose such matters only when so directed by the court preliminary to or in connection with a judicial proceeding, or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No grand juror, officer of the court, or other person shall disclose that an indictment has been found against a person before such indictment is filed and the case docketed. The court may direct that an indictment shall be kept secret until the defendant is in custody or has been released pursuant to Rule 46. In that event the clerk shall seal the indictment, the indictment shall not be docketed by name until after the apprehension of the accused, and no person shall disclose the finding of the indictment except when necessary for the issuance of a warrant or summons. No obligation of secrecy may be imposed upon any person except in accordance with this rule.

(F) Finding and return of indictment. An indictment may be found only upon the concurrence of seven or more jurors. When so found the foreman or deputy foreman shall sign the indictment as foreman or deputy foreman. The indictment shall be returned by the foreman or deputy foreman to a judge of the court of common please and filed with the clerk who shall endorse thereon the date of filing and enter each case upon the appearance and trial dockets. If the defendant is in custody or has been released pursuant to Rule 46 and seven jurors do not concur in finding an indictment, the foreman shall so report to the court forthwith.

(G) Discharge and excuse. A grand jury shall serve until discharged by the court. A grand jury may serve for four months, but the court upon a showing of good cause by the prosecuting attorney may order a grand jury to serve more than four months but not more than nine months. The tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another eligible person in place of the juror excused.

(H) Alternate grand jurors. The court may order that not more than five grand jurors, in addition to the

regular grand jury, be called, impanelled and sit as alternate grand jurors. Alternate grand jurors, in the order in which they are called, shall replace grand jurors who, prior to the time the grand jury votes on an indictment, are found to be unable or disqualified to perform their duties. Alternate grand jurors shall be drawn in the same manner, shall have the same qualifications, shall be subjected to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular grand jurors. Alternate grand jurors may sit with the regular grand jury, but shall not be present when the grand jury deliberates and votes.

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-3

In The

Supreme Court of the United States

October Term, 1997

OLLIE MASTRONARDI,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

Petition For A Writ Of Certiorari
To The Supreme Court of Ohio

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI with Appendix

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STATEMENT OF THE CASE

Petitioner does not sufficiently set forth the detailed procedural history of this case. Respondent's accurate portrayal will establish that Petitioner has re-litigated the same issues before various tribunals. The Supreme Court of Ohio has denied jurisdiction at least twice.

On May 10, 1996, Petitioner was found guilty by a jury of vehicular homicide with a finding that Petitioner was under the influence of alcohol during the commission of the offense and guilty of involuntary manslaughter with five underlying misdemeanor offenses. On May 24, 1996, the trial court imposed a definite six-month sentence on the vehicular homicide offense and an indeterminate sentence of 5 to 10 years on the involuntary manslaughter offense, to be served concurrently. (Writ, App. C).

Petitioner appealed the case on the merits to the Sixth District Court of Appeals for Erie County, Ohio. On December 5, 1997, the appellate court affirmed the trial court's judgment with respect to thirteen of Petitioner's fourteen assignments of error but ruled that the trial court erred in sentencing Petitioner on both the vehicular homicide and involuntary manslaughter convictions because the court found the

offenses to be allied offenses of similar import. (Writ, App. B). Petitioner sought leave to appeal the appellate court's affirmance of the remaining thirteen assignments of error with the Supreme Court of Ohio. Leave to appeal was denied on April 1, 1998.

Upon remand for re-sentencing, the trial court merged the vehicular homicide and involuntary manslaughter convictions and re-sentenced Petitioner to 5 to 10 years of imprisonment. Petitioner is currently seeking review of this sentence in the Sixth District Court of Appeals for Erie County, Ohio.

During the pendency of Petitioner's appeal on the merits, Petitioner filed a petition for post-conviction relief. The petition raised the same issues that were raised in the appeal on the merits. The trial court granted Respondent's motion for summary judgment and dismissed the petition. Petitioner once again appealed. On April 1, 1998, the Sixth District Court of Appeals for Erie County, Ohio, affirmed the trial court's judgment dismissing the petition and ruled that all of Petitioner's assignments of error were barred by ***res judicata***. Specifically, the Sixth District Court of Appeals ruled that "all of [Petitioner]'s arguments were previously considered or could have been

considered by this court on direct appeal." Leave to appeal to the Supreme Court of Ohio was denied on July 15, 1998.

STATEMENT OF FACTS

Petitioner's characterization of the testimony at trial omits several pertinent facts and misstates others. The following statement of facts will demonstrate that Petitioner's fact bound assertions do not warrant review by this Court.

On June 24, 1995, the young victim, Scott Brabander (hereinafter "Scott"), his friend Roger, and Scott's parents were out on the Brabander's Wellcraft boat. While idling at the dock at the Casino Restaurant on Kelley's Island, Scott's father observed a power boat speeding directly toward them traveling at about 50 miles per hour. The Brabanders watched as the power boat, now visible as a Top Gun Cigarette boat, quickly approached the dock. As the Cigarette boat bore down upon them, Scott's father yelled for the Wellcraft occupants to jump. Scott's parents jumped into the water safely. Scott tried to assist Roger, who ultimately remained flat on the boat unharmed. The Cigarette boat collided with the Wellcraft boat, flew into the air and landed in the water on the other side of the dock. Scott,

in attempting to jump from the Wellcraft, was struck in mid-air by the Cigarette boat. Initially, Scott appeared to be okay and out of danger. However, Scott quickly became disabled and rescuers had to pull Scott from the water. Scott made one final gasp of breath and died.

Petitioner grossly understates the testimony at trial when he states, "Petitioner's boat...apparently hit the port side of the Brabander boat, flew over and landed on the other side." (Writ at p. 8). Petitioner's almost nonchalant characterization of the crash severely underscores the speed at which the Top Gun Cigarette boat was traveling, the force with which the Cigarette boat collided with the Wellcraft boat and the overwhelming trauma inflicted upon Scott's young body as a result of the blunt force.

The evidence at trial demonstrated that Petitioner was the operator of the Cigarette boat at the time of the collision, that Petitioner had been consuming alcohol and driving recklessly throughout the day prior to the collision, and that Petitioner had even collided with another boat earlier in the day. Several witnesses to the crash observed the Cigarette boaters to be laughing and pouring drinks over the side of their boat. None of the Cigarette boaters

attempted to assist the Brabanders.

According to officers of the United States Coast Guard and the Ohio Department of Natural Resources, Petitioner failed field sobriety tests and was impaired. Petitioner refused to take a breathalyser but blood was drawn approximately ten and one-half hours after the collision. As a result of the lapse of time, no alcohol or drugs were found in Petitioner's blood sample. Respondent's expert testified, however, that the alcohol could have completely metabolized over the ten and one-half hour period.

Witnesses to the collision further testified that Petitioner's boat was traveling at an excessive rate of speed. According to the watercraft Rules of the Road, Petitioner's Cigarette boat illegally crossed the Brabanders' Wellcraft boat, with Petitioner taking no action to avoid the collision. Moreover, Respondent presented evidence which proved that Petitioner operated his boat recklessly and that Scott was killed as a proximate result of Petitioner's actions.

ARGUMENT

Respondent shall separately address Petitioner's "Questions Presented For Review" and demonstrate that Petitioner's efforts to challenge well-settled law and sound policy do not merit review by this Court.

A. THE DISCLOSURE OF GRAND JURY TESTIMONY IS GOVERNED BY RULE 6(E) OF THE OHIO RULES OF CRIMINAL PROCEDURE AND THE RELEASE OF ANY SUCH TESTIMONY FOR USE PRIOR TO OR DURING TRIAL IS WITHIN THE DISCRETION OF THE TRIAL COURT.

In Ohio, the disclosure of grand jury transcripts is governed by Rule 6(E) of the Ohio Rules of Criminal Procedure (hereinafter "Crim.R."). [Writ, App. H]. While a defendant may inspect grand jury transcripts only upon the demonstration of a "particularized need," **State v. Greer**, 66 Ohio St.2d 139 (1981), paragraph one of the syllabus, there is no such requirement of particularized need on the part of the State. Consequently, the release of grand jury testimony under Crim. R. 6(E) for use prior to or during trial is within the discretion of the trial court. **Id**.

Upon appeal of Petitioner's case on the merits, the Sixth District Court of Appeals

correctly stated that Crim.R. 6(E) provides for the disclosure of grand jury testimony to the prosecuting attorney for use in the performance of his duties. The court additionally determined that the use of grand jury testimony in the instant case was not prejudicial to Petitioner.

In the case at bar, Respondent used the grand jury testimony of two of Petitioner's witnesses to impeach their testimony at trial when the witnesses made statements which were inconsistent with their prior sworn statements to the grand jury. Petitioner did not object to the use of the grand jury testimony, thereby waiving any error. Further, the record demonstrates that Petitioner was provided with a copy of the relevant portions of the grand jury proceedings that were used during the cross-examination of Petitioner's witnesses. Therefore, Petitioner has failed to demonstrate that the trial court's attitude was unreasonable, arbitrary or unconscionable in permitting Respondent to use the grand jury transcripts. The use of the grand jury transcripts was proper and within the scope of both the Rules of Evidence and the Ohio Rules of Criminal Procedure. **See also** **State v. Diehl**, 67 Ohio St.2d 389 (1981).

B. UNLESS A CRIMINAL DEFENDANT CAN SHOW BAD FAITH ON THE PART OF THE POLICE, FAILURE TO PRESERVE EVIDENCE DOES NOT CONSTITUTE A DENIAL OF DUE PROCESS OF LAW.

Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. Arizona v. Youngblood, 488 U.S. 51, 57 (1988).

In the case at bar, the record is devoid of evidence which demonstrates that Respondent or any of its agents instructed the mechanic to alter, destroy or conceal evidence. Because the mechanic who examined Petitioner's boat did not alter, conceal, destroy or remove any record, document or thing, and certainly did not act with the requisite intent, the mechanic did not "tamper with evidence." Contrary to Petitioner's assertions, the mechanic made no changes to the boat and acted only with the intent of solving the mystery of whether the boat malfunctioned on the day Scott was killed. The record demonstrates that the mechanic left intact a loose cable connector so that the boat remained in the same condition in which it was found. Furthermore, there was no showing that the mechanic acted in bad faith and purposely

attempted to impair the value or availability of the evidence in question. Moreover, Petitioner was provided with a copy of the videotape of the mechanic's examination of Petitioner's boat. Thus, Petitioner was permitted at trial to attack the credibility of the mechanic's testimony. The issue of tampering with evidence was properly placed before the jury, the sole judge of the weight of the evidence and the credibility of the witnesses. **State v. DeHass**, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. Therefore, the Sixth District Court of Appeals properly found that the mechanic did not tamper with the evidence.

C. OHIO'S AGGRAVATED VEHICULAR HOMICIDE STATUTE SPECIFICALLY AUTHORIZES THE FINDER OF FACT TO MAKE A DETERMINATION AS TO WHETHER THE OFFENDER WAS UNDER THE INFLUENCE OF ALCOHOL AT THE TIME OF COMMISSION OF THE OFFENSE.

The trial court properly instructed the jury to consider whether Petitioner was under the influence of alcohol while in the commission of the offenses of aggravated vehicular homicide or vehicular homicide. A finding of alcohol consumption lies within the parameters of O.R.C. §2903.06 and may aid the jury in determining whether and to what

extent there was a lapse of care. **State v. Harder**, **unreported**, Case No. OT-95-031 (Sixth App. Dist., Ottawa Co., Mar. 29, 1996). "Once an individual has been found guilty of vehicular homicide, the statute provides for the additional step of determining whether a defendant committed the offense while under the influence of alcohol or drugs." **Id.** (Writ, App. F).

Since the statute specifically authorizes the finder of fact to make a determination as to whether a defendant committed the offense while under the influence of alcohol or drugs, Petitioner's allegation that the jury was presented with an unindicted additional finding is without merit. Petitioner was charged with the offense of operating a watercraft while under the influence of alcohol. Thus, Petitioner was on notice of exactly what was alleged. Moreover, Ohio Jury Instructions clearly provides that alcohol consumption with respect to vehicular homicide is an "additional finding" and not a specification. Consequently, there is no requirement that the determination of this issue be specified in the indictment.

D. FIELD SOBRIETY TESTS ARE NOT TESTIMONIAL OR COMMUNICATIVE ACTS, AND, THEREFORE, ARE NOT PROTECTED BY THE FIFTH

AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

The Sixth District Court of Appeals, in accord with **Pennsylvania v. Muniz**, 496 U.S. 582 (1990), correctly held that physical characteristics, such as the manner in which one speaks, walks or gestures, are non-testimonial in nature and do not invoke one's privilege against self-incrimination. In Ohio, it has been long-settled that field sobriety tests are not testimonial or communicative acts, and, therefore, are not protected by the Fifth Amendment privilege against self-incrimination. **Piqua v. Hinger**, 15 Ohio St.2d 110 (1968). "[T]he nonverbal results of [the] breathalyser and field sobriety tests are not self-incriminating statements." **State v. Henderson**, 51 Ohio St.3d 54, 57 (1990).

Under the rationale of **Muniz**, **Hinger** and **Henderson**, Petitioner's non-cognitive verbal responses to the field sobriety tests, i.e., singing the ABC's and hesitating while counting out loud, were properly admitted. The statements were non-testimonial, non-interrogatory and non-cognitive.

Petitioner has not cited any authority which supports his position. Petitioner merely states that, "Petitioner feels that the state courts here have misinterpreted the

Muniz decision. The Petitioner **feels** that his singing the ABC's does amount to a response to a custodial interrogation..." (Writ at p. 18). (Emphasis added.) Petitioner's **feelings** have nothing whatever to do with the plain holding of this Court in **Muniz** that an individual's physical characteristics, such as the manner in which one speaks, are non-testimonial and do not invoke the Fifth Amendment privilege.

E. SEVERAL COUNTS OF AN INDICTMENT CONTAINING MORE THAN ONE COUNT ARE NOT INTERDEPENDENT AND AN INCONSISTENCY IN A VERDICT DOES NOT ARISE OUT OF INCONSISTENT RESPONSES TO DIFFERENT COUNTS, BUT ONLY ARISES OUT OF INCONSISTENT RESPONSES TO THE SAME COUNT.

The Supreme Court of Ohio has long held that inconsistent verdicts on different counts in a multi-count indictment do not require dismissal of the charges or provide the basis for retrial. **State v. Hicks**, 43 Ohio St.3d 72 (1989); **State v. Brown**, 12 Ohio St.3d 147 (1984); **State v. Adams**, 53 Ohio St.2d 223 (1978), paragraph two of the syllabus, **vac. on other grounds**, 439 U.S. 811. Thus, Ohio has adopted and followed this Court's

holdings in **United States v. Powell**, 469 U.S. 57 (1984) and **Dunn v. United States**, 284 U.S. 390 (1932).

In the case at bar, any alleged discrepancy in the jury's finding of guilt on the two separate counts of vehicular homicide and involuntary manslaughter clearly occurs between counts and not within the same count. Therefore, **Dunn**, **Powell**, **Hicks**, **Brown**, and **Adams** are dispositive of this issue.

F. WHERE STATUTORY PROVISIONS ARE ALLIED OFFENSES OF SIMILAR IMPORT, THE PROSECUTION MAY CHARGE AND TRY BOTH, BUT DEFENDANT MAY BE SENTENCED UPON HIS OR HER CONVICTION FOR ONLY ONE OF THE OFFENSES.

With respect to the offenses of aggravated vehicular homicide and involuntary manslaughter, the Supreme Court of Ohio decreed in **State v. Chippendale**, 52 Ohio St.3d 118, 120 (1990), that "the manifest legislative intent is that the two statutes be enforced coextensively...[W]here the legislative intent is manifest that general and special provisions be applied coextensively and where the provisions are allied offenses of similar import, then the prosecution may charge and try both, but the defendant may be sentenced upon his or her conviction for only one of the offenses."

Id. at 122.

In the case at bar, the Sixth District Court of Appeals closely examined this issue in light of **Chippendale** and ruled that Petitioner was improperly sentenced on both vehicular homicide and involuntary manslaughter despite the fact that the two sentences were originally ordered to be served concurrently. Upon remand, Petitioner's terms of imprisonment were merged for sentencing purposes and Petitioner was sentenced to only one term of imprisonment of 5 to 10 years.

Petitioner cannot ignore the plain law in Ohio by merely stating that he "feels" there is a constitutional problem at hand. (Writ at p. 22). **Chippendale** is dispositive of the issue of whether aggravated vehicular homicide and involuntary manslaughter may properly be enforced coextensively. Both the Ohio legislature and the Supreme Court of Ohio have responded to that query with a resounding, "Yes." The decisions below were plainly correct applications of well-settled law. Because Petitioner has failed to allege even a conflict among the circuits on this issue, review by this Court is not warranted.

CONCLUSION

For the reasons stated herein, the petition should be denied.

Respectfully submitted,

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Table of Appendix Contents

UNREPORTED CASES:

State v. Harder, unreported,
Case No. OT-95-031 (Sixth App. Dist.,
Ottawa Co., March 29, 1996) A1-A19

STATE OF OHIO Appellee

v.

Brian HARDER Appellant

Court of Appeals No. OT-95-031

No. 94CR073

Court of Appeals of Ohio, Sixth District, Ottawa County.

Decided March 29, 1996.

Lowell S. Petersen, Prosecuting Attorney, and Mark E. Mulligan, for appellee.

Thomas J. DeBacco, for appellant.

OPINION AND JUDGMENT ENTRY

SHERCK, Judge

****1** This appeal comes to us from a judgment of conviction and imposition of sentence issued by the Ottawa County Court of Common Pleas, after a jury found appellant guilty of vehicular homicide. Because we conclude that the trial court committed no reversible error and the verdict was not against the manifest weight of the evidence, we affirm the judgment of the trial court.

On July 24, 1993, at approximately 11:30 p.m., a collision occurred between a full size pickup truck and a tractor-trailer rig. The pickup contained two people: twenty-one yea old Brian R. Harder (the appellant in this case) and a twenty year old woman, Kimberly Kyser. The driver of the semi was not seriously injured and appellant received only minor injuries. However, Kimberly was killed when she was thrown from the vehicle and smashed her head against the side of the semi's trailer. The accident occurred as a result of the failure of the driver of the pickup to stop at a stop sign at Russell Road, where Russell Road intersects with Route 2 just west of Port Clinton, Ohio.

Appellant, who was alleged to be the driver of the pickup, was indicted for aggravated vehicular homicide in violation of R.C. 2903.06. The indictment contained a specification that appellant was under the influence of alcohol at the time of the incident. Prior to trial, appellant waived his right to a jury as to the alcohol specification and was granted a request that such determination be made by the trial court.

At trial, various witnesses testified

as to the events of the day leading up to the accident. A summary of this testimony reveals that appellant and Tracy Seymour, a friend and owner of the pickup, had gone out fishing. The two had purchased two twelve packs of beer. Seymour testified that, over the course of the morning, he had consumed four and appellant drank at least one of the beers. However, Seymour then testified that a total of eight beers had been consumed and no one else had been drinking with the two men. Appellant and Seymour then drove around in an effort to locate Seymour's girlfriend, Renee St. Clair, who was also a friend of Kimberly's. The two eventually decided to look at the Kyser residence where Kimberly lived with her parents. Seeing Renee's car outside the Kyser home, Seymour parked the truck and Renee and Kimberly came out of the house to talk to them.

Seymour got out of his truck and began talking with Renee in her car. Kimberly chatted with appellant who took a beer from a cooler in the back of Seymour's truck and began to drink it. Because Seymour and Renee wanted to go for a drive to talk, Kimberly agreed to go for a drive with appellant. Kimberly then left with appellant who was driving Seymour's truck; Seymour and Renee left in Renee's car. After about an hour,

the couples returned to Kimberly's house. However, they left again, with appellant still driving the pickup. They all agreed to meet later at Wild Wings, a local restaurant, located at the northeast corner of the intersection where the accident occurred.

**2 Seymour and Renee testified that, at the time of the accident, they were waiting in the Wild Wings parking lot for appellant and Kimberly. Upon hearing the crash, Seymour went to the scene, along with a number of other people. Seymour talked with appellant and then went to telephone appellant's parents about the accident.

The driver of the semi rig testified that he was traveling west on Route 2 at approximately fifty-two m.p.h. when the pickup, traveling from the south side of the intersection at Russell Road struck him. The driver stated that the impact caused his semi to begin to jack-knife and then to leave the right side of the road where it ultimately came to rest.

Three Ottawa County Sheriff's Deputies testified as to their observations at the scene of the accident and information contained in their reports. Deputy Douglas St. Clair testified that he was the first

police officer to arrive at the scene. St. Clair testified that he first examined Kimberly who was pinned underneath the rear of the pickup. After determining that she was deceased, the deputy turned to appellant who was lying on the ground near the right rear tire of the pickup. St. Clair stated that, in response to questions, appellant said that his name was "Brian Harder," that he was the driver of the pickup truck, and that his birthday was September 17, 1971 (his correct date of birth). However, appellant told St. Clair that he did not know how the accident happened. According to St. Clair, appellant appeared to be seriously injured and in pain. He was later life flighted to St. Vincent's Medical Center. Appellant's injuries proved, however, to be minor.

While he was checking appellant for injuries, St. Clair stated that he did not detect any odor of alcohol from appellant. However, based upon the emergency medical squad's observation that appellant smelled of alcohol, St. Clair ordered that appellant be investigated for bing under the influence of alcohol.

St. Clair further testified as to the debris on the roadway, which included two

coolers, a full bag of ice, approximately two twelve packs of beer and scattered empty beer cans. St. Clair also testified that he examined the area around the stop sign which was posted on Russell Road, south of the intersection. The deputy found that the stop sign was reflective and clearly visible. The officer noted that, although farther south from the intersection a row of trees grew along the side of the roadway, the east view of Route 2 was unobstructed leading up to that stop sign.

The other two officers, Deputy James Karr and Deputy Sergeant William Windnagel, testified as to measurements made, photographs taken, diagrams of the pathways taken by the vehicles, observations of the scene at the time of the accident, damage to the vehicles, and the transport of appellant's blood specimen drawn at the hospital approximately two hours after the accident. Windnagel further testified that, when he observed appellant in the ambulance, appellant smelled of alcohol and appeared to be in shock or intoxicated.

**3 Dr. Robert B. Forney, associate professor of pathology and doctor of toxicology in the Poison Control Center of the Medical College of Ohio ("MCO"),

testified as to the results of the blood tests performed under his supervision at the MCO laboratory. The results of the analysis of appellant's blood showed .15 grams per one hundred milliliters ethanol. Forney stated that appellant's urine was tested only for drugs; it showed negative for five common drugs of abuse. The doctor then testified as to how much alcohol would remain in the blood stream two hours after drinking various amounts of alcohol.

Forney also testified that another analysis performed by the hospital on blood drawn from appellant at approximately the same time yielded a result of .27 grams per one hundred milliliters ethanol. The doctor explained that various human errors in testing the blood could account for the difference in results, including the drawing of blood through a device known as a Heparin lock used during the attachment of an intravenous needle. Although conceding the possibility that both blood tests might be incorrect, Forney testified that, in his opinion, the first test result of .15 performed under his supervision at MCO, was accurate. Appellant stipulated that the Medical College's "analytical methods were appropriate in gathering the blood and their method of doing the test."

The county coroner testified that the cause of death was multiple blunt trauma caused by the accident, indicating various head injuries.

Several other witnesses testified as to appellant's appearance and orientation after the accident. Elizabeth Hueske, a volunteer with the Emergency Medical Squad, testified that appellant "sounded alert" in the ambulance. Christine Skiver, a customer at the gas station who ran over immediately after the accident and spoke with appellant, testified that she noticed a "really, really, strong smell of alcohol on his breath." She also testified that appellant attempted to get up and appeared to be in pain; however, he appeared to understand what she was saying, nodding yes in response to her question of whether he could breath.

Paul Junge, a cook at Wild Wings, testified that he ran to the scene, ran back to call 911, and then returned to the accident with some wet towels to wipe blood from appellant's face. Junge testified that he spoke with appellant for five or six minutes and during that time smelled a strong odor of alcohol. Junge further sated that, based upon his experience of working around restaurants and bars for thirty-three years,

appellant was "definitely drunk, no doubt about it."

Laurie Pollard, a waitress at Wild Wings, testified that, although moaning in pain, appellant told her his name and that his dad's name was Bob Harder from Port Clinton. Appellant also responded at first that nobody was with him in the truck, but then said that "it could be or might be Kimberly Kyser." Pollard also stated that she did not smell alcohol on appellant. She stated, however, that she had not gotten very close to him because she wanted to avoid a pool of blood on the pavement.

**4 At the close of the state's case, appellant moved for acquittal; this motion was denied by the trial court. Appellant presented no additional defense. The jury was instructed on the aggravated vehicular homicide charge. In addition and over the state's objection, appellant was granted a request for a jury instruction as to the lesser included offense of vehicular homicide. The trial court also included an instruction that the evidence as to appellant's alcohol consumption was to be used by the jury only as it affected their consideration of whether appellant acted recklessly or negligently. The court further

instructed that the court and not the jury would determine whether appellant was legally under the influence of alcohol.

The jury found appellant not guilty of aggravated vehicular homicide, but guilty as to vehicular homicide. The trial court by separate judgment entry then determined that the evidence demonstrated beyond a reasonable doubt that appellant was under the influence of alcohol at the time of the accident.

After reviewing a presentence report, the trial court sentenced appellant to a term of six months imprisonment, a fine of $1,000, and permanently revoked appellant's driver's license.

Appellant now appeals his conviction and sentence, setting forth the following two assignments of error:

"ASSIGNMENT OF ERROR ONE

"PREJUDICIAL ERROR OCCURS WHEN THE TRIAL JUDGE, ON ITS OWN INITIATIVE, INSTRUCTS THE JURORS TO TAKE NOTES.

"ASSIGNMENT OF ERROR TWO

"(a) THE DOUBLE JEOPARDY CLAUSE OF the

CONSTITUTION PROHIBITS A TRIAL COURT FROM RULING [SIC] THE ACCUSED WAS 'UNDER THE INFLUENCE OF ALCOHOL' WHEN THE JURY HAS ALREADY BASED PART OF ITS VERDICT ON THE FACTUAL QUESTION OF ALCOHOL CONSUMPTION.

"(b) THE FINDING BY THE JUDGE THAT THE ACCUSED WAS UNDER THE INFLUENCE OF ALCOHOL IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

"(c) THE VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I.

Appellant, in his first assignment of error, argues that the trial court committed prejudicial error when, on its own initiative, it instructed the jurors to take notes.

A trial court has the discretion to permit jurors to take notes. *State v. Wilson* (1996), 74 Ohio St.3d 381, 389; *State v. Loza* (1994), 71 Ohio St.3d 61, 74. The trial court does not abuse its discretion when it adequately instructs the jury that note taking may be used to assist the jury but should not distract the jurors from the primary duty of hearing the evidence and testimony as it is presented by the

witnesses. *Wilson, supra.* In addition, where no objection is made concerning note taking, a defendant waives all but plain error. *Id.* (FN1)

In this case, no objection was made to the trial court's initiating note taking by the jurors. However, even had such an objection been made, we cannot say that the trial court committed any error prejudicial to the outcome of appellant's trial.

The trial court told the jury that note taking was not required, that it was a matter of individual choice, and that the jury's main concern was to listen to the witnesses. Therefore, in accord with *Wilson, supra* and *Loza, supra,* appellant had failed to demonstrate that any prejudice occurred or that the trial court abused its discretion by permitting the jurors to take notes.

**5 Accordingly, appellant's first assignment of error is not well-taken.

II.

Appellant's second assignment of error consists of three unrelated sub-parts. In sub-part (a), appellant argues that the trial court's affirmative determination of the

alcohol specification constituted double jeopardy.

Appellant was convicted of vehicular homicide. R.C. 2903.07 provides that:

"(A) No person, while operating or participating in the operation of a motor vehicle *** shall negligently cause the death of another."

"(B) Whoever violates this section is guilty of vehicular homicide, a misdemeanor of the first degree.***

"***

"If the jury or judge as trier of fact finds that the offender was under the influence of alcohol *** at the time of the commission of the offense, then the offender's driver's or commercial driver's license or permit or nonresident operating privileges shall be permanently revoked pursuant to section 4507.16 of the Revised Code."

Once an individual has been found guilty of vehicular homicide, the statute provides for the additional step of determining whether a defendant committed the offense while under the influence of alcohol

or drugs. Thus, a jury may find a defendant guilty of vehicular homicide without finding that the defendant was under the influence of alcohol.

In the present case, appellant contends that his acquittal of the aggravated vehicular homicide charge coupled with his being found guilty of vehicular homicide precludes a later finding by the trial court that appellant was under the influence of alcohol. Appellant's argument is, however, flawed because it presumes that if the jury believed appellant to be under the influence of alcohol, it could only have found appellant guilty of aggravated vehicular homicide. In this case, evidence of appellant's alcohol consumption was presented to the jury for negligence purposes only, and that evidence was such that a jury could conclude that appellant's actions constituted a substantial lapse of due care.

Moreover, appellant's argument ignores the fact that, by his own request, the two steps of R.C. 2903.07 were performed by two different triers of fact. The jury determined appellant's guilt as to the vehicular homicide charge and then the trial court determined whether or not appellant was legally under the influence of alcohol. The

jury made no finding as to whether or not appellant was legally under the influence of alcohol. Therefore, the trial court's finding as to the alcohol specification did not place appellant in double jeopardy but simply fulfilled the appropriate steps provided in R.C. 2903.07.

Accordingly, sub-part (a) of appellant's second assignment of error is not well-taken.

III.

Appellant's remaining two sub-parts of his second assignment of error pertain to manifest weight issues. In sub-part (b), appellant argues that the finding by the judge that appellant was under the influence of alcohol was against the manifest weight of the evidence. In sub-part (c), appellant contends that the jury verdict was against the manifest weight of the evidence.

**6 Upon review of the sufficiency of the evidence to support a criminal conviction, an appellate court must examine

"the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's

guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

"Relevant inquiry" does not include interpretation of evidence or determination of credibility of witnesses by the appellate court. *Id.* at 273. The verdict will not be overturned unless reasonable minds could not reach the conclusion reached by the trier of fact. *Id.*

We have previously noted the elements of vehicular homicide. R.C. 2903.07, *supra*. R.C. 2903.07 also provides, in pertinent part:

"When the trier of fact determines whether the offender was under the influence of alcohol ***, the concentration of alcohol in the offender's blood, breath, or urine as shown by a chemical test *** may be considered as competent evidence and the offender shall be presumed to have been under the influence of alcohol if there was at the time the bodily substance was withdrawn for

the chemical test a concentration of ten-hundredths of one per cent or more by weight of alcohol in the offender's blood***."

In addition to chemical tests, the trier of fact may consider other admissible evidence, such as other "physical signs" which may indicate that a defendant is under the influence. See *State v. Myers* (1971), 26 Ohio St.2d 190,199.

In the present case, it is undisputed that the pickup truck failed to yield the right of way to another vehicle, resulting in the death of Kimberly Kyser. The evidence showed that appellant was the operation of the pickup at the time of the accident. In addition to the results of the blood alcohol tests, several witnesses testified that appellant smelled of alcohol and appeared to be intoxicated. Although the evidence may have been conflicting in some respects, it is for the trier of fact to sort out such evidence in making its factual determinations.

Therefore, since we conclude that competent evidence was presented from which any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt, neither the jury's

verdict finding appellant guilty of vehicular homicide (FN2) nor the trial court's finding that appellant was under the influence of alcohol at the time of the collision were against the manifest weight of the evidence.

Accordingly, appellant's second assignment of error, in its entirety, is not well-taken.

The decision of the Ottawa County Court of Common Pleas is affirmed. Court costs of this appeal are assessed to appellant.

JUDGMENT AFFIRMED.

**7 A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also 6th Dist.Loc.App.R. 4, amended 7/1/92.

GLASSER and SHERCK, JJ., and RESNICK, P.J., concur.

FN1. Appellant has referred us to the cases of *Corbin v. Cleveland* (1944), 144 Ohio St. 32 and *State v. Waddell* (Sept. 29, 1994), Franklin App. 94APA03-328, unreported, in support of his first assignment of error. However, our research indicates that these cases no longer represent the law as now

articulated by the Supreme Court of Ohio.

FN2. As counsel for appellant so aptly stated when arguing for the inclusion of the jury instruction as to a lesser included charge, "There is ample evidence to support a finding of guilty on vehicular homicide."